Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DOUGLAS SPARKES,

Petitioner,

v.

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sparkes Action against Named Defendants

1. Whether the Ninth Circuit can ignore critical holdings of the United States Supreme Court and the California Supreme Court which, when viewed in tandem with California Labor Code § 1102.5, affords protection to Petitioner who not only testified before a Senate Subcommittee days before his gaming card was revoked by the City, but who also engaged in other protected activities which would qualify him as a "Whistle-Blower" within the meaning of anti-retaliation statutes?

2. Whether the Court erred by making its own credibility determinations, contrary to established admonishments from this Court to not do so, thereby depriving Petitioner of a jury trial at a time when substantial evidence of Pretext was presented showing that discharge was not proper?

3. Whether the Court can use "After-Acquired Evidence" to justify a terminating sanction in this critical public policy case, when this Court has cautioned against such sanctions?

4. Whether the Ninth Circuit can depart from the requirements of the Fourth Amendment otherwise prohibiting warrantless searches of Petitioner's office at a time when Petitioner was accused of a crime and had installed cameras to reaffirm his privacy interests in this casino setting?

5. Whether the Court can discard evidence to avoid a well-deserved finding that private parties have conspired with state actors to deprive Petitioner of his civil rights?

6. Whether Petitioner should be denied a jury trial on the issue of whether George Hardie engaged in outrageous conduct so as to support an Intentional Infliction claim?

7. Whether the Bell Gardens Police Department can legitimately claim immunity, given ample proof of fabricated testimony against Sparkes?

Counter-Claims Against Sparkes

1. Whether a Casino setting supports a reasonable expectancy of privacy in one's conversations or whether the Federal Omnibus Crime Control and Safe Street Act, 18 U.S.C. § 2510, *et seq.* should insulate Sparkes from the $40,000 in monetary damages imposed below?

2. Whether the Court improperly determined disputed facts that Sparkes was not acting at the direction of law enforcement when taping conversations, a finding which would otherwise insulate Sparkes from liability under California Penal Code § 633?

3. Whether the Court was justified in returning the original tape recordings and striking all references thereto, at a time when the same Claimants denied the contents of their conversations?

4. Whether the Court properly determined that Sparkes had unlawfully removed documents without justification thereby requiring Sparkes to return all documents to the Club?

PARTIES TO THE PROCEEDING

All of the parties who participated below are set out in the caption, except for Ladbrok, a foreign corporation, who was dismissed as a party Defendant in December 1996.

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Petitioner Douglas Sparkes respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit involving three consolidated appeals is not reported, and is set forth at Appendix (App. A). The denial of the Petition for Rehearing En Banc which issued on May 9, 2000 is attached as App. E. The three Judgments of the United States District Court for the Central District are not reported, and are set forth at Appendices B, C and D.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit entered on May 23, 2000, Petition for Rehearing En Banc denied May 9, 2000, by a Writ of Certiorari under 28 U.S.C. § 1254(l).

APPLICABLE FEDERAL AND STATE LAWS

Relevant portions are listed in Appendix F to this petition.

STATEMENT OF THE CASE

A. The Proceedings Below

This action was originally filed in the Superior Court of the State of California, County of Los Angeles, on June 26, 1996 by Douglas Sparkes, the former Director of Security at the Bicycle Club Casino ("Casino"), contesting his retaliatory termination and other tortious acts committed against him only weeks after Sparkes was subpoenaed and testified on March 19, 1996 before the United States Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs about crime running rampant at the Casino. The City of Bell Gardens and its Police Department ("BGPD") revoked Sparkes gaming employment card on April 11, 1996, pursuant to Municipal Ordinance.[1] (App. B, 24a).

1. The Ninth Circuit ignored its popular holding in *Yartzoff vs. Thomas*, 809 F.2d 1371, 1376 (9th Cir., 1987), which found that pretext may be inferred from timing between protected activity and alleged (Cont'd)

Due to a Drug Asset Forfeiture ruling in Florida, the Bicycle Club was managed by a Trustee on behalf of the U.S. Marshal's Service. When served with suit, former federal Trustee Harry Richard, a resident of Nevada, who resigned three months after the highly embarrassing Senate hearings, elected to remove the state court action in October 1996 to the Central District of California on the grounds that he was a federal officer working at the Casino. (App. B, 10a). As of today's date, none of the individually-named Defendants remain employed by the Casino or the City, while the federal government itself has sold its interest in the Club.

In October 1997, the Court granted permission for the filing of Counter-Claims against Sparkes because Sparkes possessed documents from the Club and covertly tape-recorded conversations in November and December 1994, with Trustee Richard, former General Manager Thomas Atherton and former Vice President of Human Resources, Wayne Martin collectively referred to as "RAM", as well as former Vice President Stephen Kuypers. (App. C & D). Sparkes produced copies of the documents and tapes in discovery between October 1996 and March 1997, while the California Department of Justice ("DOJ") with whom Sparkes worked in tandem produced many of the same documents in May of 1997. Sparkes thereafter filed Answers and asserted defenses, including justification, laches, authorization to remove documents, and authorization or direction from law enforcement, including former US Marshal Craig Meachum as well as the DOJ which empowered Sparkes to secretly record individuals, including RAM. Sparkes further claimed that the Federal Omnibus Crime Act, 28 § 2510,

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(Cont'd)
retaliatory action, while effective cross-examination of Defendants will also suffice to prove pretext. The Ninth Circuit sanitized the trial court's findings by deleting all references to facts which show that "timing" alone could support a jury finding of pretext, claiming instead that no evidence of pretext was ever offered. (App. A, 4a-5a; App. B, 11a-16a, 18a, 33a-34a).

et seq., insulated Sparkes from liability; while the Casino setting itself was not conducive to "confidential communications".

After more than 50 days of depositions, and despite the filing of vigorous and voluminous opposition, the District Court granted Summary Judgment against Sparkes on his state law based causes of action for Wrongful Retaliation, Violation of Due Process Rights guaranteed by Municipal Ordinance, for Deprivation of Civil Rights, for Emotional Distress and Tortious Interference, and for Invasion of Privacy stemming from BGPD's warrantless search of Sparkes office at a time when BGPD was processing criminal charges against Sparkes for obstruction of justice. (App. B, 15a).

The Court also granted Summary Judgment on the Counter-Claims for conversion and supposedly violating California Penal Code § 632 and attendant privacy rights which allegedly belonged to the Casino as well as RAM. (App. A, 7a; App. C, 48a-49a; App. D, 58a).[2]

With respect to Bell Gardens and its Chief, the City filed for Attorneys Fees on September 28, 1996. The District Court ruled that the City was not entitled to Attorneys Fees, and further stated that Sparkes civil rights claim was neither "frivolous, unreasonable, meritless, or vexatious." The Court noted that "Plaintiffs claim was most certainly weak", but did not qualify as the type of exceptional case that warranted an award of attorneys fees under Section 1983 or Rules 11 or 26(g) of the Federal Rules of Civil Procedure.

A review of the District Court's Decisions clearly show that when granting Summary Judgment, the District Court resolved credibility issues and weighed the evidence, clearly invading the fact-finding function of a jury. (App. B, 29a, 33a-34a). Thereafter the Ninth Circuit, in an unpublished decision, sanitized the District Court's findings and sustained Summary

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2. In addition to monetary damages, costs have been assessed against Sparkes, thereby bringing the total sum Defendants are to recover against Sparkes to $137,396.20, plus interest, all without benefit of jury trial.

Judgment on seven separate issues, wholesalely ignoring well-standing federal and state court holdings, including from this Court and the California Supreme Court, that would otherwise guarantee Sparkes', a "Whistle-blower", a jury trial in all respects. (App. A).

STATEMENT OF FACTS

On review of the Court of Appeals affirmance of summary judgment, this Court accepts as true the evidence presented by petitioner. *Anderson vs. Liberty Lobby. Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). *Reeves vs. Sanderson Plumbing Products, Inc,* , __ U.S. __, 120 S. Ct. 2097, 2110, __ L. Ed. 2d __ (2000). *Burlington Industries, Inc, vs. Ellerth*, 524 U.S. 742, 747, 141 L. Ed. 2d 633, 644, 118 S. Ct. 2257, 2262 (1998).

1. Sparkes Main Action:

Sparkes maintains that the decision of the City of Bell Gardens ("City") to **suddenly** revoke Sparkes "employment card pursuant to Municipal Ordinance § 5.25, on April 11, 1996, at the behest of City and Casino Defendants then reeling from the Senate testimony and Sparkes other protected activities in tandem with law enforcement, was retaliatory and thus unlawful under important state and federal laws designed to protect "whistleblowers". Sparkes maintains that the City did not neutrally administer its gaming program, but rather was dependent upon the Casino for more than 65% of its revenues, thus coloring its actions, including when the Bell Gardens Police Department ("BGPD") would otherwise be expected to enforce basic criminal laws designed to protect the public, including Casino patrons.

Prior to the Senate testimony, Sparkes was actively assisting the California Department of Justice in gaming investigations at the Club as well as its efforts to revoke the gaming license of George Hardie, a Club owner who had served as the Casino Manager until he was forced to resign in July 1994. Hardie's distress over Sparkes and the DOJ teaming up is best evidenced by Hardie's admission that Sparkes played a primary role in

DOJ's licensure action against Hardie, filed in June of 1995. Following Sparkes "firing" in August 1996, Hardie, during his revocation hearings, surrendered his gaming license and agreed to divest himself of his shares in the Casino. Hollman Cheung, now serving time for extortion and loan sharking, also testified before the Senate.

Sparkes also led an unsuccessful bid by an employee-sponsored ESOP to purchase the government's interest in the Club, in 1994, at a time when Trustee Richard was supporting sale of the Club to individuals reputedly associated with organized crime and thereafter to an entity which he (Richard) would manage. Not only was Richard embarrassed that his playing of tennis with Joey Cusamano, an individual blackbooked in Nevada and featured in the book and movie, *Casino*, was questioned by the Senate, as was Richard's attempt to sell the government's interest to individuals reputedly associated with organized crime, but he was likewise embarrassed that Sparkes accused him of allowing the Casino to become the "Macau of the West".[3]

Prior to February 1996, Trustee Richard appeared to assist Sparkes in certain of his protected activities by authorizing the hiring of outside counsel to assist Sparkes in helping the DOJ revoke Hardie's license and to defend Sparkes against a specious lawsuit brought by two discharged "money-launderers" against the City, the Casino and others, because their employment cards were revoked, after a hearing timely conducted pursuant to Municipal Ordinance § 5.25.

Not long after retaining this counsel, with whom Sparkes was expected to share documents, it is believed that Richard's livelihood was threatened by Hardie. It was soon reported to Sparkes that Richard and Hardie agreed on February 2, 1996 to

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3. Apparently Richard was so embarrassed that he had no problem in sending a Declaration in May 1996 prepared by his counsel to Congress which falsely reported that Sparkes supposedly recanted his Senate testimony and admitted to committing perjury in this regard, when no such remarks, Richard conceded, were ever made by Sparkes.

terminate Sparkes and to consider restoring Hardie to consulting duties at the Casino. A letter confirming these terms was subsequently given by Commander Shepherd of the BGPD to the DOJ who in turn produced it herein. Defendants objected to introduction of the Letter from James Clark, Hardie's counsel at Gibson, Dunn & Crutcher to Ann Kane Smith, Richard's counsel, reciting this agreement on the premise that it represented compromise discussions in violation of Rule 408 of the Federal Rules of Evidence. (App. B, 33a).

Within a short period of time thereafter, Sparkes and General Manager Atherton prepared for the U.S. Senate hearings. During the Senate Hearing, Atherton testified that "the government was looking for a safe way to get rid of Sparkes", while a Draft Senate Statement seized by DOJ included statements from Atherton that "plaintiff s career was used as a "bargaining chip to appease Mr. Hardie". The trial court acknowledged some of this "smoking-gun" evidence, while the Ninth Circuit did not. (App. A, 4a-5a vs. App. B, 33a-34a).

Hardie also attended the Senate hearings with City officials. Shortly thereafter he assisted in revising the Municipal Ordinance to extend time for granting appeal hearings, and in turn authored a document entitled "*110+ Questions to be Asked of Sparkes*", at or about the time Sparkes employment card was revoked. The reason for Hardie's intense involvement is more fully discussed, below.

Although Sparkes employment card was revoked in April 1996 and Trustee Richard stopped paying Sparkes in May 1996, right before Richard resigned, a new Trustee, Frederick Wyle, finally reduced Sparkes severance to a termination in August 1996, without affording Sparkes an opportunity to respond. Sparkes was likewise not given an opportunity to respond at any time after his employment card was revoked. Sparkes claims that he was constructively discharged months before Wyle was hired, including when the City declined to proceed with an administrative hearing timely requested by Sparkes because the

Casino had supposedly already terminated Sparkes when it stopped paying him, thereby rendering the City's action supposedly "moot". The Ninth Circuit and District Court ignored the constructive discharge evidence and used the new Trustee's actions to insulate the Club from liability, ignoring blatant admissions by Wyle, Atherton, Martin and BGPD that they had input into Wyle's August 1996 decision, while Sparkes did not.

Sparkes had already docketed his state court lawsuit by then and was responding to demurrers from the City and the Casino pointing fingers at each other. (App. B, 32a).

Sparkes maintains that the individually named private parties conspired with the City and its Police Department to unlawfully deprive Sparkes of his civil rights, including a name-clearing hearing, in retaliation for Sparkes protected speech and other "whistleblowing" activities. (App. B, 26a).

Casino General Manager George Hardie, also a founder and part-owner of the Bicycle Club, hired Sparkes as the Casino's Director of Security in June of 1992. At the time, Hardie knew that Sparkes had not completed his college degree program, but had completed a distinguished career with the Los Angeles County Sheriffs Department, prior to receiving a disability retirement as attested to by Undersheriff Paul Myron and Chief LeRoy Baca, now Sheriff of Los Angeles County.

Following his hiring, Sparkes set about to develop the Security staff into a well-trained Security force and was allowed to hire a former LASD Sergeant, Bill Birge. Birge and Sparkes thereafter met with Marshal Meachum, then in charge of overseeing the government's interest in the Casino. Both claim that Marshal Meachum instructed them to be his "eyes and ears" at the Club, and both accepted, often secretly tape recording tapes which were then shared with the Marshal's Service. (App. C, 46a). Hardie himself had both make secret tape recordings as well.

Birge and Sparkes soon learned that although Hardie appeared to support their oral efforts to obtain police intervention

from the City involving internal investigations of a criminal nature, including major theft by employees, Hardie was in reality undermining their efforts behind the scenes, including by instructing witnesses to not participate in police interviews.

As the relationship between Sparkes and Hardie deteriorated, Birge was axed first. However, when Hardie approached the Marshal's Service about firing Sparkes, in early 1994, Hardie admitted that he was told that Sparkes was a "good guy". Contemporaneously, Hardie's partner, Hollman Cheung was arrested on federal charges. Sparkes made a covert audio taping when one of Cheung's employees requested assistance in gaining access to Cheung's Office in order to destroy documents. Based upon the tape, Sparkes was ordered to secure the office pending arrival of federal search warrants procured by the United States Attorney based upon statements made by Sparkes as an affiant. Sparkes also shared the tape with Trustee Richard, clearly placing Richard on notice that covert taping was occurring. (App. C, 39a).

Immediately thereafter Hardie issued memos suddenly accusing Sparkes of not properly handling his Department. The Ninth Circuit and the District Court utilized these memos to justify their conclusion that "good cause" existed for Sparkes firing because Sparkes supposedly admitted to refusing to comply with his superiors directives. (App. B, 20a). The events surrounding Hardie's issuance of these directives as well as Sparkes defenses thereto were ignored, including Sparkes claim that he was fully reporting to Marshal Meachum about Hardie's activities. Sparkes and the DOJ below also relied upon the well-established police principle that you do not reveal to a suspect, in this case Hardie, or subsequently Richard or Atherton, details about a police investigation.

One could easily infer that Sparkes refusal to compromise the securing of Cheung's offices was troubling to Hardie. Within a matter of weeks, Hardie was also seen removing records and file cabinets from his office, when outstanding discovery requests existed in the federal asset forfeiture case, *United States*

vs. Kramer. Sparkes directed Security to video tape Hardie. The tape was turned over to Richard and in turn the Marshals Office. After an emergency hearing was scheduled concerning this and other matters in Florida, Hardie submitted his written Resignation decrying both law enforcement and **internal surveillance** of high stakes customers, patrons and management alike. At or about this same time, Sparkes made a covert taping of a conversation taking place in a bathroom with soon-to-be General Manager Kuypers, whose own gaming problems in New Jersey were well known, concerning cocaine seized from snorting patrons who were not arrested, while the cocaine itself was placed in Sparkes safe rather than turned over to BGPD.

Not long thereafter, Sparkes was confronted in his office by an angry Hardie who threatened to "get even" for "ruining" him. From that point forward, various events occurred which caused Casino executives, including RAM, to tell Sparkes that Hardie was "out to get" Sparkes. However by time of suit, RAM claimed that they were simply playing practical jokes upon Sparkes including when giving Sparkes a picture of an airplane with Hardie in the cockpit, flying a banner that said "Wings over Bell Gardens". The drawing was delivered to Sparkes not long after two bi-planes flew banners over the 710 Freeway in July 1995 stating, "Need a Fix, Contact the Security Chief" and "Criminals Welcomed Here". (App. B, 29a).

Martin also penned "love notes", i.e. "Looking forward to working with you soon" and "Hope you're feeling better" on 5x7 photographs of Hardie.

Sparkes claim that Hardie began enlisting the City and Club Defendants to get rid of Sparkes. Although Hardie was no longer employed at the Casino after 1994, he still had clout with the City as a part owner of the Club as well as, as a citizen with a decade behind him of having groomed friendships with City officials. (App. B, 31a). The record shows that as past relationships soured, Hardie generally succeeded in obtaining the removal of City Managers and Chiefs of Police, and even supported recalls against City Council members, see testimony

from former City Finance Director David Bass (Club's First Trustee), former City Manager Charles Gomez, and former Police Chief Andy Romero, and DOJ representatives, as well.

Besides Hardie's influence, former Attorney General John Van De Kamp noted in his July 1995 Report to Bell Gardens that the City must strengthen its ties with the Club which was and remains "the goose that laid the golden egg". Petitioner submits that once he incurred Hardie's wrath, the City could reasonably be expected to back Hardie and any plan to get rid of Sparkes, for fear of upsetting its own applecart, see Press Release from Councilmember Deitch, Hardie's former broker, attacking the federal government and Attorney General Dan Lungren.

It is alleged that Sparkes protected activities to eradicate crime at the Club in tandem with **the DOJ,** known to be Hardie's ardent political foe, actively interfered with Hardie's standing orders to BGPD to "Stay away. Don't call us, we'll call you." In this regard, substantial evidence, including testimony from Deputy AGs Paul Bishop and Kent Harris and Special Agent Bender, showed that except for a brief period of time when Romero was Police Chief and Gomez was City Manager, BGPD miserably failed as a law enforcement agency when the Casino, as opposed to unruly patrons, was the focus of its investigations. BGPD was in fact suspected of compromising investigations. Even former Attorney General John Van De Kamp acknowledged existence of BGPD's "Hands-off" policy when Hardie was General Manager, in his Report.

To suggest that Hardie's motives when issuing the April 1994 directives to Sparkes were geared towards self-preservation is to put it mildly. Hardie's vengeance, for Sparkes was also exhibited by DOJ documents showing that James Clark, Hardie's counsel, singled Sparkes out by name in numerous letters between the Fall of 1994 and February 1996 when Hardie and Richard finally agreed to fire Sparkes. Once Hardie enlisted Richard's agreement to fire Sparkes, Sparkes believes that the City was induced to join their scheme in hopes of coming up

with a "safe way" to rid Bell Gardens of Sparkes. The "safe way" turned out to be the revocation on April 11, 1996 of Sparkes work permit which the City issued and subsequent refusal to provide a hearing. (App. B, 25a).

The District Court found most persuasive the City's claim that Sparkes card was properly revoked in April 1996 because Sparkes had just then obstructed an official police investigation. This reasoning was noticeably absent from the Ninth Circuit's decision. (Compare App. A with App. B, 20a). When reviewing the pending police investigation into the questionable loan-sharking activities of the latest head of Asian Games, the Court concluded that BGPD's police investigation was legitimate and that none of the Defendants influenced BGPD in its actions against Sparkes. Sparkes obviously disagrees. (App. B, 23a).

The Court glossed over official DOJ reports and investigation statements from Robert Murcott, the Club's investigator, which undermined each of these findings, not to mention reports from the BGPD which contradicted the very Crime Report filed by BGPD against Sparkes for Obstruction of Justice. Not only did BGPD untruthfully describe what transpired in the Wang Investigation, but it also refused to interview the other members of the Joint Investigation team, including Del Bender of the DOJ, Murcott or Sparkes, before revoking Sparkes, card. BGPD however interviewed RAM.

Thereafter BGPD prepared a Crime Report listing Sparkes as the "suspect" in which it omitted material facts about BGPD's participation in a Joint Investigation with Sparkes after March 26th, when it claimed Sparkes was ordered to Cease and Desist from all future investigations. The Cease and Desist letter simply told Sparkes to not proceed further until he spoke to BGPD. Sparkes spoke to BGPD and thereafter was wired by BGPD to tape record conversations with informants. A tandem investigation with Sparkes, Murcott, the DOJ and BGPD thereafter ensued into allegations that there was *a fixing of the shoe during tournament play, the paying of juice for jobs, the*

failure to post additional satellite games, and the continuation of loan sharking activities by managers.

The consensus opinion from DOJ, Murcott and Sparkes was that from the end of March 28th to April 11th, BGPD begrudgingly participated in the Joint Investigation.

Although BGPD agreed to take additional witness statements with DOJ, Murcott and Sparkes on two additional nights, on April 9th, at the last minute, BGPD advised DOJ and Sparkes that there were other pressing matters which precluded BGPD from being present but that the balance of the team could proceed without them. **The team**, and not simply Sparkes, then proceeded to interview witnesses and taped the conversations.[4]

BGPD's Gaming Unit was neither operational or within communications reach to respond to calls from the team, initiated by Sparkes, late on the evening of April 9th and appears to have deliberately failed to respond to Sparkes pages left with BGPD's pager number, as Sparkes was instructed to do by the BGPD dispatcher, at approximately 11:00 p.m. the night of April 9th.

These attempts were made since DOJ, Murcott and Sparkes perceived exigencies requiring that they recommend a) the immediate sealing of the Asian Games office to ensure that key satellite records were not destroyed, and b) the suspension of the Asian Games Managers to ensure that employee witnesses were not subjected to anymore intimidation at work while additional statements were obtained; RAM agreed and implemented the recommendations.

The very next morning, although Sparkes, Bender and Murcott had scheduled themselves to meet BGPD at 9:00 a.m., Martin intervened and caused the Gaming Unit and the Chief to refuse to meet with the team. Instead, the Chief conducted

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4. The District Court found that Plaintiff unilaterally tape recorded the interviews and thus improperly withheld the tapes from the BGPD. Sparkes and Murcott however testified that BGPD and DOJ authorized Sparkes to retain possession of the tapes, to facilitate transcription of the same by Sparkes Secretary at the Club. (App. B, 14a).

lengthy and extensive meetings with Club management including Richard who enlisted the Police Chief to take care of "it" (Sparkes) for fear that if (the Casino) did "it", Sparkes would accuse them of retaliating because of his Senate testimony. (App. B, 13a).

Despite the serious allegations levied against Wang by the team, BGPD failed to talk to Sparkes, Murcott or DOJ to hear their side of what happened, **before let alone after BGPD** accused Sparkes of obstructing justice, the basis given for revoking Sparkes employment privileges. Early in the morning on April 10th when BGPD was supposedly meeting with "innocent" Club executives, including RAM, Lt. Shepherd told Bender that Sparkes would need a job with the **DOJ, even before** BGPD's investigation was "underway".

Immediately after Sparkes was removed, RAM "consented" to a search of Sparkes office, even though the City and DOJ had consistently obtained search warrants before searching offices at the Club. (App. B, 27a). Before BGPD arrived to conduct a warrantless search, Martin admittedly rummaged through Sparkes' belongings, although the Court said Martin was simply conducting an inventory. This event however occurred, as did BGPD's search, **only after** the camera in Sparkes office had been turned off. Sparkes has consistently maintained that documents allegedly found in his office once BGPD did arrive to search were not there beforehand, but rather were selectively placed in the office to bolster certain of the claims asserted by Defendants in their Joint Statement; the decision of the Club to open up a closed and secure safe in which counterfeit logs and counterfeit monies were kept and to leave the safe open prior to BGPD's arrival, followed by BGPD's decision to accuse Sparkes of unlawfully possessing counterfeit bills in the office safe and to thereafter deny that it took possession of the Club's logs properly documenting the custody and control of counterfeit, is equally suspect.

Also of circumstantial value is the fact that immediately after Sparkes testified before the Senate Subcommittee, where

Shepherd, Hardie, the Chief and various Council members, including Hardie's former broker, were present, Shepherd approached Sparkes in the hallway and confided that Sparkes had lit a "bombshell" when testifying. Shepherd "does not recall making" this statement. Shepherd, however, by his own communications with DOJ knew as early as February 1996 that Hardie and Richard had agreed to get rid of Sparkes and Shepherd was further aware that Atherton had just testified that "the government was looking for a safe way to get rid of Sparkes".

Less than one week after the Senate hearing, Sparkes was served with a Cease & Desist letter, authored by Shepherd, followed by a Revocation Notice from Chief Freeman two weeks later. Right after Sparkes was removed, Chief Freeman engaged in substantial efforts to dissuade Attorney General Lungren from backing Sparkes, including when sending a letter with a "chronology" written by Atherton attached accusing Sparkes of coercive and perjurious testimony before the Senate; the City declined to produce this letter, necessitating that DOJ produce its copy of the same.

Besides BGPD trying to destroy Sparkes credibility with DOJ, with Club help, including by falsely accusing Sparkes of being a spouse and child abuser, Richard also filed a Declaration with the Senate at the beginning of May 1996 falsely accusing Sparkes of admitting to Richard to having committed perjury before the U.S. Senate. Martin also admitted to telling Chief Freeman to "unhasten" Sparkes' hearing process. Not long thereafter, Martin falsely advised Sparkes in a letter that DOJ rather than the City had caused Sparkes to be placed on leave. Similarly, Martin's decision, on directions from Richard to stop paying Sparkes, followed shortly thereafter by Brian Sun, the City's counsel's, claim that a hearing was now moot as Sparkes, had been constructively discharged are facts which when coupled with former Police Chief Romero and former City Manager Gomez's testimony that BGPD had historically deferred to the Casino on law enforcement issues and were

beholden to Hardie, at a time when Hardie touted himself as Bell Garden's "Santa Claus", would more than amply provide a jury with sufficient evidence of an unlawful conspiracy against Sparkes.

Nonetheless, the Court found that newly hired Trustee Wyle reached an independent decision to justify Sparkes firing months later. Sparkes denies each and every allegation and specifically notes that had "good cause" existed for his termination, he would have been terminated long before April 11, 1996, rather than rewarded with a $10,000 pay increase only months before for being a loyal and productive employee.

Thus the decision to suddenly fire Sparkes in August 1996 after he was denied a hearing and ceased receiving pay in May 1996, is suspect and evidence of pretext, particularly when other evidence shows that other employees who had their cards revoked by the City were given timely hearings and paid by the Club until an administrative decision after hearing issued.

Besides adversely determining the date Sparkes firing would be scrutinized, the Court also improperly concluded that Wyle reached a totally independent decision without input from the Defendants. (App. A, 32a). However, Defendants Uncontroverted Fact No. 172, coupled with Wyle's **Declaration, directly contradicted the Court's findings,** since Atherton, Martin and BGPD all admitted to providing input before Wyle made his decision, while Sparkes was not even talked to.

Because these individuals clearly had a motive to lie about Sparkes to protect their own pecuniary interests, and since these Defendants were utilized by Wyle to speak to BGPD, also named in the state action, the inescapable conclusion is that Wyle's "independent decision" was substantially colored by biased witnesses. Wyle himself admitted that before concluding that Sparkes relationship with the Chief was so deteriorated as of August 1996 that he had to be removed as the Director of Security, Wyle had Atherton speak to Magdaleno at BGPD; Magdaleno is the very same officer accused by Sparkes of preparing and signing a blatantly false and misleading crime

report against Sparkes, and of destroying all of his handwritten notes and field interview records to prevent effective cross-examination thereon.

The Court also concluded that loss of one's employment card justified Sparkes firing. Sparkes continues to maintain that the Court's analysis of what happened in the Wang investigation to justify that revocation is totally misplaced. (App. B, 18a). Sparkes further submits that in light of evidence of disparate treatment in the enforcement of the Municipal Code, a good cause finding on this basis could not issue either. The record shows that the Casino and the City condoned employment of unlicensed personnel, including ones with felony records, as "consultants. (Van De Kamp Report conceded disparate application of these rules).

2. Counter-Claims Against Sparkes and Privacy Rights

Although the Court accepted the Casino's Conversion claim at face value, (App. C & D), and found Sparkes could not justify his retention of documents because he feared for his safety, the Court failed to give any weight to Sparkes defenses, including his entitlement to documents because a) the Casino authorized and paid for conflicts counsel to assist Sparkes **not only** in his defense of litigation filed against him, but in connection with various proceedings, including the Senate hearings and Hardie's licensure proceeding, wherein documents would be needed to support Sparkes testimony; b) a crime report was filed by BGPD against Sparkes about the very matters which Sparkes possessed documents on, namely the Wang investigation, and thus Sparkes was entitled to retain the very documents which demonstrated his innocence; c) the documents were needed by Sparkes, to defend in the administrative proceedings subsequently abandoned by the City.

Sparkes claimed that he was authorized to remove documents, long before the revocation of his employment card. The fact that Atherton and Trustee Richard have experienced a sudden lapse of memory in these regards, including with respect to retaining Manning, Marder & Wolfe to represent Sparkes on

the above matters, and have also denied giving direct authorization to Sparkes to remove and use documents to defend against the "money-launderers" lawsuit demonstrates that material facts still exist relative to these Counter-Claims.

Although the Court found that the Casino and RAM had reasonable privacy expectations in their conversations with Sparkes, (App. C & D), the Court rejected Sparkes claim that he had legitimate privacy expectations that would preclude the Casino or BGPD from rummaging through his tangible personal belongings. (App. B, 27a-28a). The Court concluded that Sparkes had no reasonable privacy expectation in his office, even though Sparkes installed a camera to monitor what occurred in his office when he was gone. Undisputed evidence shows this camera, which reestablished Sparkes legitimate privacy expectations, was turned off before Martin rummaged through Sparkes belongings and planted documents thereafter seized by BGPD against Sparkes.

Disparate treatment was also shown with respect to the search of Sparkes office, in that although "Consent" was given by the Casino to search Sparkes office, the Casino and BGPD, as well as the DOJ, had always required a search warrant before searching Casino offices, i.e. Hollman Cheung, in April 1994, money launderers in November 1994, and in February 1996 when BGPD was searching for markers in an executive's office accused of allowing an employee to work under an assumed name, without Sparkes knowledge, albeit with higher level management's approval.

Just like in Sparkes office where people knew they were being recorded, employees knew that wiretapping and audio/visual surveillance at the Casino was the norm, rather than the exception. The Court disagreed. (App. C, 45a). Signs were posted throughout the casino in these regards and even Martin posted signs in Human Resources, on the second floor, where his conversation with Sparkes supposedly took place, warning an employee, in numerous different languages, that they could be subjected to audio and visual taping.

Instead, the Court felt that Richard's conclusion that the executives offices were private was enough to support Richard and his colleagues privacy claims. (App. C & D). The Court ignored Hardie's admission that as the General Manager who occupied Richard's office before Richard, Hardie even had wiretapping equipment installed to monitor and record phone conversations. Thereafter Martin installed similar equipment to permit monitoring of employee calls on Casino phones. Richard's knowledge of the above and his decision to check for bugging equipment, within a month of Sparkes' last recorded taping, belie the claim that RAM did not suspect their conversations were being monitored by Sparkes, prior to then.

Similarly, Trustee Richard, Atherton, Hardie, Martin, Kuypers and other executives knew that Sparkes was acting on behalf of law enforcement on a regular basis, including when taping efforts to compromise the securing of Hollman Cheung's office and of Hardie removing boxes. Richard did nothing thereafter to eliminate the spying, nor did he post any new signs to restore privacy rights to the executive offices, at any time, let alone between Sparkes first taping of Kuypers on July 4, 1994 and Sparkes final taping of Atherton on December 30, 1994.

The Court simply noted that because U.S. Marshal Meachum, was no longer around, Sparkes could not claim that he was acting as Meachum's "eyes and ears" when tape recording these Claimants. (App. C, 46a). The Court overlooked evidence that Sparkes was also assisting other federal agencies, including Customs and the Secret Service, as well as DOJ. In fact although DOJ does not remember when it heard any of Sparkes tapes, DOJ admitted that it knew Sparkes had taped, yet no one told Sparkes to not tape. Instead, Deputy AG Bishop admitted to encouraging Sparkes to get anything and everything he could. Richard's counsel even defended her client in May of 1997 in connection with the DOJ's Gaming Action against Richard on the grounds that Sparkes, was acting at the direction of the DOJ.

The sole Counter-Claim which Sparkes prevailed on below pertained to the allegation that Sparkes recorded an Executive Committee meeting on March 26, 1996, presumably because a tape was supposedly found in Sparkes office (ironically after the cameras were turned off and Martin was allowed therein). Andrew Serrata testified that he was directed to install a camera in the room in question by management immediately prior to March 26th. Although Sparkes **appreciated the** Court's willingness to spare him from $5,000 in additional damages, the Court in doing so improperly resolved a contested factual dispute as it also did when finding that Sparkes surreptitiously taped Counter-Claimants on at least eight occasions justifying the award of $40,000 in damages. Since there were only seven tapings in dispute, including the March 26, 1996 tape and Kuypers conversation in a public bathroom, which the Court declined to accord privacy rights to, it becomes a mystery as to how the Court could find that eight violations occurred. (App. A, 7a).

The Court also struck the audio tape transcripts which Sparkes and counsel submitted and ordered Sparkes to return the original tapes to Club-Claimants even though Sparkes maintained that the tapes were admissible to impeach each of the Defendants, including relative to the "good cause" arguments advanced by the Casino below, i.e. extra-marital activity could not justify one's firing and that Sparkes had permission from Trustee Richard to perform consulting work. Similarly, the tapes widely discuss management's indifference to certain criminal activities at the Casino, including *utilization of the Impress Fund for loan sharking activities, failure to report games, the payment of juice for jobs, and the inflating of the Casino's financial worth on instruction from Richard to better the Club's sales prospects,* as well as the sudden revelation in November of 1994 that Richard was contemplating imposing a three-day suspension upon suspected money launderers. Also discussed was Hardie's threats to Sparkes, Hardie's campaign to oust Trustee Richard, and the placement by casino management of cocaine in Sparkes office safe.

3. Sparkes Reputation, Good Name, Honor and Integrity has been Compromised

Under these circumstances, Sparkes, claims that his reputation, good name, honor and integrity has been viciously attacked, while the refusal of the Court to give him a trial by his peers merely aggravates the damage already done. Newspaper and hearing accounts given by BGPD publicly attacked Sparkes good name, honor and integrity. Likewise the Court disregarded Hardie's acknowledgment that revocation of one's work card in the gaming industry, alone, can be fatal to one's employment in that industry. Sparkes has not been able to find employment in that industry ever since.

Sparkes also presented evidence showing that Chief Freeman, backed by Atherton and Martin, falsely and willingly painted Sparkes as a "perjurer" and "coercive", as well as a spousal and child abuser, while Richard also admitted to circulating a false Declaration to the US Senate as well.

REASONS FOR GRANTING WRIT

I. THE DECISIONS BELOW TOTALLY IGNORE MORE THAN TEN HOLDINGS OF THIS COURT

As this Court has just reaffirmed in *Reeves vs. Sanderson Plumbing Products, Inc.*, __ U.S. __, 120 S. Ct. 2097, 2110, __ L. Ed. 2d __ (2000), credibility determinations are for a jury and not the court. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Burlington Industries, Inc, vs. Ellerth*, 524 US 742, 747, 141 L. Ed. 2d 633, 644, 118 S. Ct. 2257, 2262 (1998).

A jury could clearly find the August 1996 decision to be tainted and pretextual and evidence of a conspiracy to deprive Sparkes of his civil rights. The great pains of Defendants to besmirch Sparkes reputation in newspaper accounts, letters to California Attorney General Lungren and Richard's Declaration to the United States Senate, amply demonstrate the existence of a material issue of disputed fact about this employer's real motivations for its actions and justify redress of Sparkes deprivation of civil rights. *Waters, et al. vs. Churchill, et al.*,

511 U.S. 661, 677-679, 114 S. Ct. 1878, 128 L. Ed. 2d 686, 700-701 (1994); *Price Waterhouse vs. Hopkins*, 490 U.S. 228, 252, 109 S. Ct. 1775, 1791, 104 L. Ed. 2d 268 (1989).

Even if "good cause" for firing exists due to Wyle's acquisition of "After-Acquired Evidence", a fact and conclusion disputed herein, this Court does not countenance a terminating sanction for to do so would frustrate the purposes behind legislation designed to protect discriminatees. This Court's acknowledgment in *Churchill, supra,* 511 U.S. at 673, of the importance of the federal Whistleblower Protection Act of 1989, 103 Stat. 16, easily militates in favor of an extension of this Court's holding in *McKennon vs. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995), to a Whistle-Blowing case arising under California Labor Code § 1102.5.

Similarly, the decision below ignores that biased Defendants authorized a search of Sparkes' office at a time when Sparkes was clearly the subject of a criminal investigation, albeit one that was never pursued. However, since Sparkes name was clearly placed on the "suspect" line, the warrantless search that the Ninth Circuit countenances is infirm. *O'Connor vs. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987), particularly since Sparkes installed a camera, to reaffirm his privacy rights in his office; *Mancusi vs. DeForte*, 392 U.S. 364, 370 (1968). Warrantless search per se unreasonable, *Steagald vs. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), especially when evidence shows that the DOJ and the BGPD always obtained search warrants when investigating criminal allegations.

Likewise, when according privacy rights to RAM in their conversations with Sparkes, in this Casino setting, the Ninth Circuit has glossed over this Court's holdings in *Hoffa vs. United States*, 385 U.S. 293, 303, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966).

II. THE DECISION IS DIRECTLY CONTRARY TO WHISTLEBLOWING STATUTES, GAMING CASELAW AND CALIFORNIA SUPREME COURT HOLDINGS

Noticeably absent from the Ninth Circuit and District Court rulings is any discussion about Labor Code Section 1102.5 which affords a Whistle-Blower like Sparkes protection from the very type of retaliation taken herein. Instead both Courts continue to refer to Sparkes as an "at will" employee without any constitutionally or statutorily protected property or liberty interests. This runs directly afoul of *Green vs. Ralee Engineering Company*, 19 Cal.4th 66 (1998), which recognizes that an "at will" employee is protected by the anti-retaliation statutes.

Similarly, the Courts below cite *Cotran vs. Rollins Hudig Hall Intl Inc.*, 17 C.4th 93 (1998), but not for the proposition which really emanates from that case, namely that this Employer was obligated to conduct a good faith investigation in the first place, **including one which placed Sparkes on notice and further** gave him a **reasonable opportunity to respond.**[5]

Thus the Court's reasoning that the various accusations against Sparkes constitute "good cause" to justify Sparkes firing and denial of a jury trial, is misplaced. To suggest that Wyle could easily be found by a jury to have notice of Sparkes protected activities and that Wyle's articulated reasons for terminating Sparkes are merely pretextual, is to put it mildly. *Waters, et al. vs. Churchill, et al., supra,* 511 U.S. at 677-679, 114 S. Ct. 1878, 128 L. Ed. 2d at 700-701; *Price Waterhouse*

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5. The concept of providing an accused with notice of the charges against him and the opportunity to confront one's accusers is not a new or novel concept nor one to be lightly disregarded. It's genesis may be found in the dawn of time, Job 29:16 and Acts 25:16, and has been continuously followed including by modem civilizations except in a witchhunt frenzy. As Justice Cardozo wrote in *Escoe vs. Zerhost*, 295 U.S. 490, 493, 79 L. Ed 1566, 1569, 55 S. Ct. 818 (1935), "He shall have a chance to say his say before the word of his pursuers is received to his undoing,"

vs. Hopkins, 490 U.S. 228, 252, 109 S. Ct. 1775, 1791, 104 L. Ed. 2d 268 (1989).

Similarly, well-established gaming law imposes due process requirements upon Casinos and government agencies before employment cards may be revoked. These precedents were totally ignored herein. *Barry vs. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1978), opportunity to be heard must be "at a meaningful time and in a meaningful manner when one's horse trainer's license" is suspended. *O'Callaghan vs. Eighth Judicial District*, 90 Nev.33, 505 P.2d 1215 (1973); *State vs. Rosenthal*, 93 Nev.36, 559 P.2d 830 (1977), once an employee gains a work permit, one acquires a "privilege" to work and may not be deprived of the same without notice and a hearing.

Statutes, which would allow for the automatic revocation of one's work permit likewise will not stand for want of fairness. *Rosenthal vs. State*, 96 Nev.959, 620 P.2d 874 (1980). *State vs. Gonzalez*, 142 N.J.618, 667 A.2d 684 (1995); *People vs. Ramirez*, 25 Cal.3d 260, 268 (1979). As a consequence "[I]n almost every setting where important decisions turn on questions of fact, **due process requires an opportunity to confront and cross-examine adverse witnesses**." *Goldberg vs. Kent*, 397 U.S. 254, 269, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (emphasis added).

III. THE COURT IGNORED THIS COURT'S FORMULATION OF THE AFTER-ACQUIRED EVIDENCE RULE

The Court ignored the well-established After-Acquired Evidence Rule articulated by this Court which is easily extended to this anti-retaliation case. As this Court observed in *McKennon vs. Nashville Banner Pub.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995). The decision below even discards well established state law in California which has been even more generous than this Court when finding that specific statutes must not be vitiated by denying recovery to a victim simply because of the discovery of after-acquired evidence of wrongdoing.

Murillo vs. Rite Stuff Foods, Inc., 65 Cal.App 4th 833 (2nd Dist., 1998), lying about one's citizenship status does not bar recovery; also see *Copper vs. Rykoff-Sexton*, 24 Cal.App 4th 614 (1994), lying about one's credentials on an employment application does not per se terminate an employee's wrongful termination claim because to do so would frustrate the public policy behind other statutes.

IV. THERE IS A CONFLICT BETWEEN THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT

Although the Ninth Circuit affords Counter-Claimants a reasonable expectation of privacy in their conversations, in this casino setting, when ample evidence shows the claims of privacy are objectively unreasonable, the ruling itself starkly contrasts with the Seventh Circuit's decision refusing to accord privacy rights to conversations occurring in a public setting similar to the one at hand. In refusing to protect statements that undercover agents surreptitiously overheard and recorded a trader in the pits of the Chicago Mercantile Exchange, the Seventh Circuit in *In the Matter of John Doe Trader Number One, I*, 894 F.2d 240, 243 (1990) noted:

> The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. *Hoffa vs. United States*, 385 U.S. 293, 303, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966).

"(I)f Doe really did believe the Exchange rule protected him from the recording of his conversations, **his belief was naive rather than reasonable.**" *Id.* 894 F.2d 240, at 244.

This conflict between Circuits should be resolved in favor of Sparkes, especially since all Counter-Claimants knew that Sparkes was recording conversations for law enforcement, in an institution then controlled by the federal government.

V. THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

A. Whistleblower Protection Has Been Abrogated

Labor Code § 1102.5 provides at will employees with insulation from firing if they have been retaliated against for assisting or cooperating with law enforcement. *Green v. Ralee Engineering Company*, 19 Cal. 4th 66 (1998).

B. Gaming Caselaw Must Be Reaffirmed, Especially Since The Employer Herein Was The Federal Government Then Operating A Private Criminal Enterprise

Not only should this Court obligate California to apply well-established principles, given the proliferation of gaming in California, but the federal government should be instructed as well that when it operates a private criminal enterprise, seized under the Drug Asset Forfeiture program, it too is expected to respect due process rights of gaming employees. *Barry vs. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1978); *State vs. Rosenthal*, 93 Nev.36, 559 P.2d 830 (1977); *State vs. Gonzalez*, 142 N.J. 618, 667 A.2d 684 (1995), Also see *Board of Regents vs. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Goldberg vs. Kelly*, 397 U.S. 254, 269, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (emphasis added).

C. In Light Of Ample Evidence Of Pretext And A Conspiracy Between Private Defendants And State Actors, Sparkes Is Entitled To A Jury Trial To Redress Deprivation Of His Civil Rights, Notwithstanding The City's Claimed Immunities

Sparkes is clearly entitled to recover for violation of his civil rights, including his right to due process and to be free of warrantless and unreasonable searches and seizures. *L. Tribe, American Constitutional Law 2d Ed. (1988).*

Although Sparkes was clearly entitled to a due process hearing under the Municipal Ordinance, that hearing never occurred as the City first amended its Ordinance to eliminate the time frame within which the hearing had to be conducted,

and then after Sparkes appealed, refused to grant a hearing on the grounds that it was moot because the Club stopped paying Sparkes in May 1996, after Martin encouraged the City to "unhasten the hearing process". An offering of a hearing months after Wyle had concluded that Sparkes would be terminated from the Club, a fact considered significant by the Ninth Circuit, was nothing more than an effort to provide Sparkes with a meaningless remedy, especially since the City had already joined private Defendants and the Club in a well-orchestrated campaign to permanently deprive Sparkes of employment at this Casino and other gaming institutions, if not anywhere else for that matter.

The Club's, including RAM's and Hardie's police and City contacts, were clearly pointed and definitely aimed at having the City fire Sparkes, while the City willingly assumed its role to ensure that "the goose" continued to lay its "golden egg". *United Steelworkers vs. Phelps Dodge Co.*, 865 F.2d 1539, 1542 (9th Cir., 1988, cert. denied).

Although there is no specific admission that the instant employer is a conspirator with Bell Gardens, that evidence is seldom available. Evidence of disparate treatment may when viewed together with the other proof offered, support an inference of conspiracy. In turn, it is for the jury and not the court to determine what inferences may or may not be made. *Phelps Dodge supra,* at 1542, 1547.

In light of these facts, the City's attempt to invoke government immunities is misplaced, particularly when the City and its Police Department have acted in bad faith, including by fabricating evidence against Sparkes, and by uttering highly defamatory remarks, while simultaneously withholding a timely hearing from Sparkes. *Buckley vs. Fitsimmons*, 509 US 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Owen vs. City of Independence, supra,* 100 S. Ct. at 1418, rejecting immunity defense of municipality who had failed to provide police chief with a Name-Clearing Hearing; *City of St. Louis vs. Praprotnik*, 488 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

D. Sparkes' Privacy Rights Were Unlawfully Ignored, While Privacy Was Afforded Defendants In A Casino Setting, Contrary To Well-Established Case Law And Statutory Provisions Which Would Otherwise Insulate Sparkes From Any And All Damages Imposed

The Court found that Sparkes did not have a legitimate privacy interest in his office and ignored evidence showing that notwithstanding City and State regulations entitling BGPD and the DOJ to inspect, neither of these agencies before the search of Sparkes office had ever searched an office, especially of a management employee, without benefit of a search warrant.

The motives of Martin, Richard and Atherton in authorizing for the first time a warrantless search of Sparkes office may properly be considered when defining Sparkes expectation of privacy. *Hill vs. NCAA*, 7 Cal. 4th 1 (1994).

As this Court affirmed, employees do not forfeit all rights to privacy in the workplace. *O'Connor vs. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987); in the private employment setting, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant, quoting *Mancusi vs. DeForte*, 392 U.S. 364, 370 (1968). Accordingly, the warrantless search of Sparkes office was per se unreasonable. *Steagald vs. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

After gutting Sparkes privacy rights, including his opportunity to obtain redress for highly personal documents to this day not returned, the Courts below improperly accorded privacy rights to Counter-Claimants, including by artificially distinguishing between the first floor of the Casino where gaming occurs and the second floor where allegedly only executive offices are maintained although Gaming also occurs on the second floor.

The Court's distinction between the floors becomes even more troubling when one considers that the Court also imposed liability for Sparkes second conversation with Kuypers, even

though it took place in Sparkes office on the first floor, in Security, where audio and video surveillance signs were also clearly posted and Sparkes was known to have installed his own camera.

In light of these continuing conflicts with the Court's Judgments on the Counter-Claims, Sparkes submits that the artificial distinctions drawn by the Court are not rationally based and strongly suggest that the Court utilized the subjective assumptions espoused by the Counter-Claimants, rather than the reasonable objective standard which should control, before Sparkes is deprived of $40,000 without benefit of due process, let alone a jury trial. *See Deteressa vs. ABC*, 121 F.3d 460 (1977).

Although Sparkes requested the Court to apply the federal Omnibus Crime Control Act, 18 U.S.C. § 2510, *et seq.*, the Court declined to do so, stating there was no reason for departing from Penal Code § 632. The fact that a federal trustee is one of the Counter-Claimants and both he and Atherton were residents of Nevada, when hired to work at a Casino that all employees knew was owned and controlled by the federal government, should have been more than sufficient to justify application of the federal law.

Similarly, State Law would have also compelled the same conclusion, had the evidence been fully presented to a jury because Sparkes was clearly acting at the direction of law enforcement and thus could not be held liable for $40,000 in damages. Ample evidence shows that Sparkes was acting at the direction of law enforcement when taping conversations at the Casino, including when acting as the "eyes and ears" of Marshal Meachum as well as on behalf of DOJ. Although DOJ never admitted that Sparkes was its "agent", the requirement that one be an agent is not codified in Section 633, nor must one use equipment provided by the police or act only on specific directions. *People vs. Towery*, 174 Cal.App.3d 1114, at 1127 (1985).

Under the circumstances of this case it would be manifestly wrong to refuse protection to Sparkes when all Defendants conceded that they expected and instructed Sparkes to work with law enforcement and were further aware Sparkes was turning over tapes to the police concerning Club activities.

Even state law, which the Court purported to follow provides for the admission of illegal tape recordings, or the contents thereof, regardless of how embarrassing the tapes may be, when a party seeks to use Penal Code Section 632 as a shield to sanction perjury, including when his or her taped statements were made in settlement negotiations. *People vs. Crow*, 28 Cal.App 4th 440, 451 (1994); *Frio vs. Superior Court*, 203 Cal.App.3d 1480, 1497 (1988). Counter-Claimants herein have consistently refused to testify truthfully and accordingly Sparkes should be entitled to impeach them in front of a jury, through their own mouths.

E. Sparkes' has Not Wrongfully Converted Bicycle Club Property, Nor Should The Court Have Required Return Of Documents

Even after seeing Sparkes defenses that he feared for his safety and also claimed legitimate entitlements to the documents he was in possession of, the Court drew adverse inferences against Sparkes and resolved clearly disputed factual and legal issues. Sparkes still maintains that his retention was justified because Hardie's threats and the activities of other named Defendants to heighten Sparkes' awareness of Hardie's threats justified the same. Likewise to expect Defendants to volunteer documents at a time when Defendants were intent on destroying Sparkes is farcical at best.

When Defendants raised the issue of the return of the documents for the first time in February 1997, Sparkes counsel proposed a global Protective Order but Richard declined to agree to one.

See In re: IBP Confidential Business Documents Litigation, Bagley vs. Iowa Beef Processors, 797 F.2d 632 (1986), *Iowa Beef Processors, Inc. vs. Bagley*, 601 F.2d 949, *cert. denied*,

441 US 907, 99 S. Ct. 1997, 60 L. Ed. 2d 376 (8th Cir. 1978). Bagley's former Employer accused Bagley of committing perjury before the U.S. Senate and of stealing documents. After these allegations publicly surfaced, Bagley was dismissed from his then current employer and up through the time of trial could not find any replacement work, just like Sparkes; Bagley sued and received substantial judgments against his former employer.

F. Sparkes Should Be Allowed Redress From Emotional Distress Intentionally Inflicted Upon Him By Hardie

Again it if for the jury rather than the Court to decide if Hardie engaged in Outrageous Conduct so as to invite tort liability. Hardie's actions against Sparkes, however, were not mere insults, annoyances, petty oppression or triviality, nor were Hardie's threats against Sparkes to be lightly regarded either. A vendetta lasting since 1994 is clearly documented in this case. *Molien vs. Kaiser, supra,* 27 Cal. 3d at 929-930. *See Alcorn vs. Anbro Engineering, Inc.*, 2 Cal.3d 493, 497 (1970) emphasizing that one's "status as an employee" can also cause events which otherwise do not seem sufficiently outrageous to support an Intentional Infliction claim.

CONCLUSION

Accordingly Sparkes respectfully prays that this Court will grant the Petition for Certiorari to prevent a clear travesty of justice. This Court is respectfully asked to set aside each grant of Summary Judgment, including the monetary damages and costs assessed against Sparkes, and to order Defendants to trial on at least the Main Action.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 23, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-56617
D.C. No. CV-96-07343-CAS

DOUGLAS SPARKES,

Plaintiff-counter-defendant –
Appellant,

v.

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Defendants-counter-claimants –
Appellees,

LCP & PARK PLACE ASSOCIATES, partnerships which operates & participate in the decisionmaking operations of the BICYCLE CLUB; LADBROK, a foreign corporation; FRED FREEMAN, Chief, as the Chief of Police for the City of Bell Gardens & as an individual; CITY OF BELL GARDENS, a municipal corporation; GEORGE HARDIE,

Defendants-Appellees.

Appendix A

No. 98-56785
D.C. No. CV-96-07343-CAS

DOUGLAS SPARKES,

Plaintiff-counter-defendant –
Appellant,

v.

LCP & PARK PLACE ASSOCIATES, partnerships which operates & participate in the decisionmaking operations of the BICYCLE CLUB; LADBROK, a foreign corporation; FRED FREEMAN, Chief, as the Chief of Police for the City of Bell Gardens & as an individual; CITY OF BELL GARDENS, a municipal corporation; GEORGE HARDIE;

Defendants – Appellees,

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Defendants-counter-claimants –
Appellees.

Appendix A

No. 98-56788
D.C. No. CV-96-07343-CAS

DOUGLAS SPARKES,

Plaintiff-counter-defendant –
Appellant,

v.

LCP & PARK PLACE ASSOCIATES, partnerships which operates & participate in the decisionmaking operations of the BICYCLE CLUB; LADBROK, a foreign corporation; FRED FREEMAN, Chief, as the Chief of Police for the City of Bell Gardens & as an individual; CITY OF BELL GARDENS, a municipal corporation; GEORGE HARDIE,

Defendants – Appellees,

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Defendants-counter-claimants –
Appellees.

MEMORANDUM[1]

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted March 9, 2000
Pasadena, California

Before: FERNANDEZ, TASHIMA, and SILVERMAN, Circuit Judges.

Douglas Sparkes appeals the summary judgments entered against him in his action alleging that he was wrongfully terminated from his employment at the Bicycle Club Casino, and on the counterclaims filed against him alleging that he misappropriated club property and illegally recorded confidential conversations. We affirm.

First, the Bicycle Club proffered numerous non-discriminatory reasons for its decision to terminate Sparkes, which are sufficient to justify Sparkes' termination. *See O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996) (theft of documents); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985) (disobeyed orders from his supervisors); *Smith v. Singer Co.*, 650 F.2d 214, 217 (9th Cir. 1981) (inability to act as liaison of employer); *Frausto v. Legal Aid Society of San Diego, Inc.*, 563 F.2d 1324, 1328 (9th Cir. 1977) (inability to get along with co-workers and management); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93, 109, 948 P.2d 412, 423, 69 Cal. Rptr. 2d 900, 911 (1998) (reasonable grounds to believe termination proper). Sparkes failed to provide any evidence that the club's stated reasons for his termination

were a pretext. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890-92 (9th Cir. 1994); *Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal. App. 4th 189, 197, 48 Cal. Rptr. 2d 448, 454 (1995).

Second, Sparkes' substantive due process claim fails because he could only have a constitutionally protected property interest in his job if there were " 'existing rules or understandings that stem[med] from an independent source such as state law.' " *Brady v. Gebbie*, 859 F.2d 1543, 1548 (9th Cir. 1988) (citation omitted). Since Sparkes was an at-will employee, he could "be discharged for any reason and have no right to a hearing." *Id.* His procedural due process claim also fails with respect to losing his job because he had no property interest in it. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972); *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993); *Gabe v. County of Clark*, 701 F.2d 102, 103 (9th Cir. 1983). Finally, he had no federal due process right to a hearing within seven days, as opposed to the later hearing date which was offered by the city, but declined by Sparkes. *See FDIC v. Henderson*, 940 F.2d 465, 475 (9th Cir. 1991).

Third, Sparkes' civil rights claim against the club and its employees fails because there was no sufficient evidence that they entered into a conspiracy with a state actor. *See United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc); *Fonda v. Gray*, 707 F.2d 435, 438-39 (9th Cir. 1983). Sparkes' civil rights claims against the city and police also fail because those state actors did not cause his termination. Clearly his

relationship with the club had gone very sour; that caused his termination. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977); *Gilbrook v. City of Westminster*, 177 F.3d 839, 855 (9th Cir.), *cert. denied City of Westminster v. Herr*, __ U.S. __, 120 S. Ct. 614, 145 L. Ed. 2d 509 (1999); *Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258, 266 (5th Cir. 1984); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

Fourth, Sparkes' claim for invasion of privacy fails because no club employee had any reasonable expectation of privacy in the contents of his office. *See New York v. Burger*, 482 U.S. 691, 702, 107 S. Ct. 2636, 2643, 96 L. Ed. 2d 601 (1987); *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242 (1974); *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35-40, 865 P.2d 633, 654-57, 26 Cal. Rptr. 2d 834, 856-59 (1994).

Fifth, Sparkes' claim for intentional infliction of emotional distress fails because the challenged conduct was not extreme and outrageous. *See Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1122-23, 762 P.2d 46, 61, 252 Cal. Rptr. 122, 139 (1988); *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1129, 257 Cal. Rptr. 665, 671-72 (1989). Also, no evidence connected one of the incidents (the banner) to the persons sued.

Sixth, damages were properly awarded against Sparkes for violations of California Penal Code § 632 because he taped private conversations with his co-workers without their consent. *See Coulter v. Bank of America Nat'l Trust and*

Savings Ass'n, 28 Cal. App. 4th 923, 929-30, 33 Cal. Rptr. 2d 766, 770-71 (1994); *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1487-90, 250 Cal. Rptr. 819, 822-24 (1988). Sparkes did not come within the law enforcement exception. *See* Cal. Penal Code § 633. An examination of the record indicates that the district court did not err regarding the number of tapings.

Seventh, an injunction for return of club documents was properly awarded against Sparkes because his claimed need for the documents does not justify his improper taking of them. *See O'Day*, 79 F.3d at 763; *Pillsbury, Madison & Sutro v. Schectman*, 55 Cal. App. 4th 1279, 1284-89, 64 Cal. Rptr. 2d 698, 702-05 (1997).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION RE MOTIONS FOR SUMMARY JUDGMENT DATED AND FILED AUGUST 11, 1998 AND ENTERED AUGUST 14, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-96-7343-CAS (MCx)

DOUGLAS SPARKES,

Plaintiff,

vs.

BICYCLE CLUB CASINO, a gambling establishment; LCP and PARK PLACE ASSOCIATES, partnerships which operate and participate in the decision making operations of the BICYCLE CLUB; GEORGE HARDIE, as an individual; HARRY RICHARD, as an individual; THOMAS ATHERTON, as an individual; WAYNE MARTIN, as an individual; CHIEF FRED FREEMAN, as the Chief of Police for the City of Bell Gardens and as an individual; THE CITY OF BELL GARDENS, a municipal corporation; DOE CORPORATIONS 1-19 and DOE DEFENDANTS 20-30,

Defendants.

Appendix B

ORDER RE MOTIONS FOR SUMMARY JUDGMENT BROUGHT BY: (1) CITY OF BELL GARDENS AND CHIEF FRED FREEMAN, (2) THE BELL GARDENS BICYCLE CLUB, LCP ASSOCIATES, LTD., THOMAS ATHERTON, AND WAYNE MARTIN, (3) HARRY RICHARD, AND (4) GEORGE HARDIE AND PARK PLACE ASSOCIATES, LTD.

This is a wrongful termination case. All named defendants have brought motions for summary judgment on all of the claims asserted in plaintiff's complaint. Since many of the causes of action overlap and many of the arguments raised by the defendants are similar, the Court addresses the motions in this single order.

Plaintiff's claims for relief are based on his contention that his employment was terminated in retaliation for engaging in certain protected activities. To establish a *prima facie* case for retaliatory termination, plaintiff must bring forward evidence demonstrating that he engaged in a protected activity, that he was thereafter terminated, and that there was a direct causal relationship between his protected activity and his termination. *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 476 (1992). Once this showing is made, the burden shifts to the defendants to articulate legitimate, non-retaliatory reasons for plaintiff's termination. If the defendants make this showing, the burden then shifts back to the plaintiff to show that the reasons given by the defendants for the action are merely pretextual, and that retaliation was the true reason for his termination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981); *Holmes v. General Dynamics Corp.*, 17 Cal.App.4th 1418, 1426 n.8 (1993).

Appendix B

I. *Factual Background*

The following facts are established from the record.[1]

The Bell Gardens Bicycle Club ("Bicycle Club" or "Club") is a legal card club located in the City of Bell Gardens, California ("the City"). Through forfeiture proceedings commenced under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"), the federal government became a part owner of the Club. In April of 1990, a Trustee was appointed to oversee the United States' interest in the Club. Defendant Harry Richard served as Successor Trustee from March 1993, until June 1996, when Frederick Wyle was appointed to replace him. Defendant George Hardie was the General Manager of the Club from November 1984, through August 1994, and then continued as a consultant to the Club until January 1995. Defendant Thomas Atherton was advisor to the Trustee from 1993, until July 1995, when he became the acting General Manager of the Club. Defendant Wayne Martin was at all relevant times, the Vice President of Human Resources at the Club.

Plaintiff Douglas Sparkes worked at the Bicycle Club as Director of Security from June 1992, through April of 1996. In April 1996, plaintiff was suspended from employment when his employment identification card authorizing him to work at the Club was suspended by defendant Bell Gardens Police Department ("BGPD").[2]

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1. Unless otherwise noted, these facts are undisputed.

2. As required by the Bell Gardens Municipal Code, plaintiff had obtained an employment identification card from the City of Bell Gardens in June of 1992.

Appendix B

Plaintiff was an at-will employee. While employed by the Club, plaintiff's job duties included, among other things, responsibility for reporting suspected or alleged criminal activity to the Club management and to law enforcement agencies, and acting as liaison between the Club and law enforcement agencies.

In the summer of 1995, Del Bender, an investigator for the California Department of Justice ("DOJ"), was assigned to investigate James Wang, head of the Asian Games section at the Club. Bender informed defendant Atherton, then general manager of the Club, of the investigation. Atherton asked plaintiff and the Club's surveillance investigator to also commence investigating Wang and report anything suspicious to Atherton. By August 1995, the Club was aware that both the DOJ and the BGPD were investigating criminal allegations involving Wang, and Atherton instructed plaintiff to cooperate with law enforcement in their investigations. Despite these instructions, on March 5, 1996, plaintiff interviewed Steven Vo in connection with his investigation of Wang, but did not inform BGPD or Club management of the interview or of what he learned until many weeks later. Plaintiff informed Bender of the interview on March 12, 1996.

On March 19, 1996, the United States Senate Permanent Subcommittee on Investigations conducted a hearing about the government's forfeiture program, using the Bicycle Club as a case study. Plaintiff testified at the hearing that stealing, drug dealing, extortion, and loan sharking, among other crimes, were going on at the Club, and that security measures were inadequate. He further testified that defendant Richard,

then the Successor Trustee, condoned criminal activity at the Club.

On March 27, 1996, the BGPD sent a letter to plaintiff asking him to turn over whatever information he had concerning criminal activity at the Club, and to "cease and desist" from conducting a purported criminal investigation without involving the BGPD. Richard directed plaintiff to give law enforcement agencies any information he had gathered concerning criminal activities, and to meet with the U.S. Marshals Service on April 1, 1996, to share the information with them.[3] On April 1, 1996, plaintiff met with the U.S. Marshals Service. The Marshals instructed plaintiff that he should cooperate with the BGPD and should follow their instructions, and that he should turn over his investigative materials to the U.S. Marshals Service. The record is unclear as to whether plaintiff complied with these instructions.

During the first week of April 1996, Bender and the BGPD conducted several interviews of Club employees in further pursuit of the ongoing investigation. On April 9, 1996, in a conversation with plaintiff, members of the BGPD advised plaintiff that they would not be conducting further interviews with possible witnesses in the Wang investigation that evening. Plaintiff Bender and an investigator hired by plaintiff for the Club then proceeded to interview two witnesses on their own that evening, at the home of Steven

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3. At the same time, plaintiff asked Richard for permission to purchase a pinhole camera and body wire so that he could conduct a further investigation at the Club. It is not clear whether Richard ever approved such purchase.

Vo. Plaintiff tape recorded these interviews and maintained custody of the tapes.

After the interviews, the three men proceeded to the Club, arriving at around 11:30 p.m. Plaintiff sent a security guard to seal the offices of the Club's Asian Games managers, prohibiting anyone from coming or going from that area. Plaintiff was aware that sealing the offices might alert the subjects as to the existence of the investigation. He called Richard and informed him of his desire to seal the offices.[4] Bender also spoke with Richard on the phone, and informed him that the DOJ was not requesting that the offices be sealed at that time, and that Bender did not have authority to make such request. Richard told plaintiff to contact Atherton and discuss it with him. Plaintiff then contacted Atherton and Martin, who came to the Club and discussed the situation with plaintiff. As a result, the Asian Games managers offices remained sealed, and several Asian games managers, including James Wang, were suspended. Plaintiff did not contact the BGPD that night, and did not inform them of his activities.

The next morning, April 10, 1996, Martin contacted the BGPD to inform them of the events of the previous night. Martin, Atherton, and Richard went to the BGPD headquarters and were interviewed by both BGPD officers and FBI agents. Chief Freeman told Atherton and Martin

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4. There is some dispute in the record as to whether the telephone call to Richard occurred before or after the security guard sealed the offices. There is no dispute on the record, however, that the offices were sealed before actual approval was obtained from Club management and without prior notification to BGPD.

that he was upset with plaintiff because of what had transpired the night before. On the afternoon of April 10, 1996, Richard instructed plaintiff to go to the BGPD station. Plaintiff did so. Although the police asked for the tapes plaintiff had made during his interviews the night before, plaintiff did not turn over the tapes on April 10, 1996.

On April 11, 1996, Chief Freeman of the BGPD sent a letter (the "suspension letter") suspending plaintiff's employment identification card, based on allegations that plaintiff had interfered with BGPD's criminal investigation. The suspension letter stated that BGPD believed that plaintiff had revealed information to third parties about ongoing criminal investigations, and that he had caused the persons who were the targets of the investigation to be suspended. On the same day, upon learning from the BGPD that plaintiff's employment card had been suspended, the Club placed plaintiff on paid administrative leave. Club policy mandates the immediate suspension of an employee whose employment card has been suspended, pending reinstatement of the card.[5]

Later in the day on April 11, 1996, the Club conducted an inventory of the contents of plaintiff's office at the Club. The inventory was supervised by Martin, and was conducted by two Club employees. Plaintiff had commingled numerous personal items with work-related items, and his files and diaries in some instances contained both work and personal information. Plaintiff's office had also been used by other

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5. Further, Bell Gardens Municipal Code § 5.25 prohibits the Club from employing anyone who does not possess a valid employment identification card issued by the City.

employees when plaintiff was not on duty; for example, the security "watch commander" for other shifts would use plaintiff's office, and the security department safe was located in plaintiff's office. Plaintiff's personal effects were segregated from the Club's property and were stored in a locked facility until plaintiff could arrange to have them picked up. After the Club's search concluded, the BGPD obtained consent from Atherton, the acting General Manager, to conduct their own search of plaintiff's office. Club policy, known to plaintiff, provided that all Club offices, desks, and lockers were subject to inspection by the Club at any time. Further, Chapter 5.25 of the Bell Gardens Municipal Code provided that card clubs such as the Bicycle Club were to be open for inspection at all times, and that City representatives could inspect such clubs at any time without a search warrant.[6]

Later in April 1996, the BGPD issued a police report in which it was asserted that plaintiff had obstructed justice. The content of this report was in part based on statements given to the BGPD by Richard, Wayne, Atherton, and others.

At the time of plaintiff's suspension, the Bell Gardens Municipal Code provided that an administrative hearing was to be held within seven days of suspension of an employment identification card. However, the Bell Gardens City Council voted to change this code section shortly after plaintiff was

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6. Prior to February 1996, only the "City Manager," or his authorized representative, was entitled to conduct such searches. In February 1996, the City's Municipal Code was amended to provide that the Chief of Police, or his representative, was authorized to conduct these warrantless searches.

suspended to eliminate the seven-day hearing requirement. Although several discussions occurred between plaintiff's counsel and counsel for the City in an attempt to schedule a hearing for plaintiff, plaintiff has not received a hearing in connection with the suspension of his employment card. While the discussions regarding setting a hearing were ongoing, plaintiff filed the instant action on June 27, 1996.

During the month of June 1996, Richard resigned his position as Trustee for the Club and was replaced by Frederick Wyle. On August 2, 1996, more than three months after plaintiff was suspended, Frederick Wyle made the decision to terminate plaintiff's employment.

II. *Analysis*

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The standard set forth in Rule 56(c) is met when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Abromson v. American Pacific Corp.*, 114 F.3d 898, 902 (9th Cir. 1997). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could affect the outcome of the suit under the governing law. *Id.*

When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must

be viewed in the light most favorable to the party opposing the motion." *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A. E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997).

Although not required to "scour the record" on its own to determine whether any questions of material fact are present, *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7th Cir. 1994), the Court thoroughly reviewed all of the materials submitted by the parties, and gave careful attention to each item of evidence provided. Certain facts the Court found most salient to its analysis are discussed below.

a. *Retaliation due to Whistleblowing Activities*

Plaintiff has brought a claim against the Club, Park Place Associates, and LCP Associates alleging that he was terminated for engaging in "whistleblowing" activities.

As explained above, for plaintiff to prevail on this claim for relief, he must show that he engaged in a protected activity, that he was subjected to an adverse employment decision, and that there is a causal relationship between the protected activity and the adverse decision. Once plaintiff establishes a *prima facie* case of retaliation, the defendant must articulate a legitimate, non-retaliatory explanation for its actions. At this point, the burden[7] shifts back to the

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7. The burden of proof remains with plaintiff throughout the case. The burden of production temporarily shifts to the defendant once plaintiff has made out a *prima facie* case, but it shifts back to plaintiff if the defendant employer successfully articulates a legitimate reason for its actions.

plaintiff to show that the reasons the employer gave were merely pretextual. *Flait*, 3 Cal.App.4th at 476; *Holmes*, 17 Cal.App.4th at 1426 n.8. The parties agree that plaintiff was first suspended and then terminated from his employment at the Club. The record also establishes that plaintiff testified before the United States Senate, and that plaintiff conducted investigations into alleged criminal activity at the Club. Plaintiff asserts that these were the protected activities for which he was terminated. For the reasons set forth below, the Court finds that plaintiff has failed to establish a *prima facie* case of retaliation, since he has provided no evidence that demonstrates a causal connection between his allegedly protected activity and the Club's decision to terminate him.

A distinction may be drawn between plaintiff's suspension from work and his eventual termination. Plaintiff was initially suspended because his employment card was suspended by the BGPD on April 11, 1996. The Club is prohibited by Bell Gardens Municipal Code § 5.25.060 (formerly, § 5.25.140A) from employing anyone who does not possess a valid employment card issued by the City. Plaintiff admitted this fact in his deposition.[8] Thus, plaintiff's initial suspension was appropriate, if not required, on these grounds.[9]

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8. Sparkes Depo. at 741:18-22.

9. At some point during his suspension, plaintiff's status changed from paid to unpaid leave. Although plaintiff argues that the change of status may have been unfair, or that it may have constituted a constructive discharge, plaintiff sets forth no theories of recovery based on this event, and none of plaintiff's causes of action are based on it. In addition, plaintiff provides no evidence that this action was retaliatory.

Appendix B

The record reveals that the decision to terminate plaintiff was made by Frederick Wyle in August 1996. Wyle was appointed to replace Richard as Trustee of the Club in June 1996, after plaintiff's suspension. Plaintiff provides no evidence that Richard, Hardie, Atherton, or Martin participated in or caused Wyle's decision to terminate plaintiff. Plaintiff also provides no evidence that Chief Freeman or the BGPD participated in or caused Wyle's decision. Moreover, plaintiff offers no evidence that Wyle committed any wrongdoing or that Wyle had any motive to retaliate against plaintiff for any reason. Since all of plaintiff's theories of retaliation are based on alleged conduct or self interest by individuals other than Wyle, plaintiff has not met his burden of proof to show a causal relationship between his alleged protected activities and the decision to terminate him.

In addition, even if plaintiff had made out a *prima facie* case, the Club has responded with a strong evidentiary showing that there were valid non-retaliatory reasons for his termination. For example, Richard and Atherton had directed plaintiff to cooperate with the BGPD's investigation of James Wang and the Asian Games section of the Club. Plaintiff was also instructed to keep the Club's management and the BGPD informed of his own investigations. Despite this instruction, plaintiff conducted interviews with suspects and then sealed the offices of the Asian games managers on the night of April 9, 1996, without informing the BGPD. Although the BGPD may or may not have been aware that plaintiff planned to interview suspects that night, it is undisputed that they did not know of or approve further actions by plaintiff, such as the sealing of the offices. Bender

Depo. at 1330-31; Shepherd Decl. ¶ 21. As Sparkes admits, his decision to seal the offices may have alerted the subjects to the existence of the BGPD's investigation. Sparkes Depo. at 4113-4114. The police later stated to Club managers that they believed plaintiff had interfered with their investigation that night. They later issued a police report based on these events, asserting that he had obstructed justice. Sparkes Depo. Ex. 200. This failure to cooperate with BGPD was directly at odds with the instructions the Club had given plaintiff.

Plaintiff also failed on some occasions to keep Club management informed of his investigatory activities and neglected to consistently inform law enforcement agencies of his activities and findings in a timely manner.[10] The record demonstrates that Club management considered these acts, known to them at the time of his suspension, to be acts of insubordination and refusal to follow orders.

Moreover, the Club learned in May 1996, after his suspension had begun but months prior to the decision to terminate plaintiff, that plaintiff had removed documents and other materials belonging to the Club from the Club premises without permission, and that he had disclosed some of these documents to his counsel. This, too, was in contravention of

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10. Sparkes admitted as much in his declarations and deposition testimony. Sparkes Depo. at 233-239; Sparkes Decl. in Opp. to Anti-Slapp Motion ¶133. Sparkes also had a generally poor relationship with the Chief of Police, which he admits was not in the best interests of the Club. *Id.*; Sparkes Depo. at 5403-5406. Sparkes understood that his job description required him to act as the Club's representative with law enforcement agencies, and to work cooperatively with these agencies on security matters. Sparkes Depo. Ex. 57.

Club policy known to the plaintiff. Sparkes Depo. at 287, 290, 297, 315, 329-330, 1698; Cookerly Decl. ¶ 2. Although the Club demanded return of these items, plaintiff refused to do so.[11] The Court finds that these actions, which are not disputed by plaintiff, standing alone, provided legitimate reasons for his termination.[12] *See Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985).[13]

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11. These actions are the subject of a counterclaim by the Club. See Court's Order on Motion of Counter-Claimants Bell Gardens Bicycle Club, Thomas Atherton and Wayne Martin for Summary Judgment on the Counterclaims.

12. It is also noteworthy that there is evidence of other instances of alleged wrongdoing in support of the Club's decision to terminate plaintiff. For example, Club management had reason to believe plaintiff was having an extra-marital affair or similar relationship with a subordinate employee, in contravention of written Club rules against fraternization of security personnel with other employees. Sparkes admits he had a relationship with this employee. Sparkes Depo. at 2863, 4182-83, 4314. Several members of Club management apparently had trouble getting along with plaintiff, including Kevin Beaton, with whom plaintiff had a loud altercation at the Club in April 1996, and which was apparently extreme enough to cause other employees, including Lynn Plank and Thomas Atherton, to become concerned that plaintiff would engage in physical violence. Sparkes Depo. at 3127; Atherton Decl. ¶ 23. In 1994, plaintiff had been warned that Club management was displeased with his job performance by letter from Hardie, then the general manager of the Club. Sparkes admits he disagreed with the content of the letter, and continued to violate some of the directives therein. Sparkes Depo. at 437-41, Ex. 60.

13. Although plaintiff argues that he has raised questions of fact as to whether some of his alleged misconduct actually took place as described by defendants, the evidence in this record does not support plaintiff's argument.

More importantly, even in a case where "good cause" for the termination would have to be shown (as opposed to this case, where plaintiff admits he was an at-will employee), the proper inquiry would not be whether defendants could now prove that plaintiff actually committed all of the acts claimed to support the decision to terminate his employment, but rather would be whether the employer's decision to terminate plaintiff was made in good faith and was generally reasonable, based on the facts the employer knew from its good faith investigation of his alleged misconduct. *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal.4th 93, 107-09 (1998). Defendants have clearly met this standard with the undisputed evidence they have proffered.

Because the Club has brought forth evidence of legitimate reasons for its decision to terminate plaintiff, the burden shifts back to plaintiff to rebut these legitimate reasons offered by the Club. *Burdine*, 450 U.S. at 257. Plaintiff offers no evidence that contradicts the Club's evidence of his misconduct in this regard, and apparently does not dispute that most of these events occurred. Since plaintiff has not raised a material issue of fact to rebut these legitimate bases for his termination, summary judgment for the defendants is appropriate on these claims. *Jenkins v. MCI Telecommunications Corp.*, 973 F. Supp. 1133, 1137 (C.D. Cal. 1997).

b. *Due Process*

Plaintiff brings this claim against the City of Bell Gardens and Chief Fred Freeman, its Chief of Police, alleging that they conspired with certain individuals at the Bicycle

Club to wrongfully deprive plaintiff of his employment, and to deny him the opportunity for a fair administrative hearing.

First, the Court notes that there are no allegations made, nor is any evidence proffered, that the BGPD and Chief Freeman were involved, or accused of being involved, in any of the alleged criminal activities plaintiff was investigating at the Club. Chief Freeman and the other officers of the BGPD were not the subject of any of plaintiff's investigations.

Since plaintiff does not clarify in his complaint whether he seeks recovery for violation of his substantive or procedural due process rights, the Court considers both possible contentions. First, the City's suspension of plaintiff's employment card did not, on its face, violate plaintiff's substantive due process rights. To succeed on such a claim, plaintiff must show both that he is unable to pursue employment in his field of occupation, here the gaming or security industries, and that this inability is due to actions that were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 65 (9th Cir. 1994); *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991).

Plaintiff cannot show a violation of his due process rights based on the loss of his job as Director of Security at the Bicycle Club, since it is well settled that there is no constitutionally protected interest in holding a particular position. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894-96 (1961). Plaintiff has not offered any

evidence to show that he has been unable to obtain employment in his chosen field.[14]

In addition, Bell Gardens Municipal Code § 5.25 provides that the Chief of Police may suspend an identification card if an employee commits an offense which constitutes an "immediate threat to the public welfare" or is "inimical to legitimate gaming." Chief Freeman's decision to suspend plaintiff's identification card was appropriate under this section, since the Chief believed that plaintiff had interfered with an ongoing police investigation at the time he ordered the suspension. Based on interviews with Club management on the morning of April 10, 1996, and on the materials gathered previously in the BGPD's investigation of Wang, Chief Freeman had sufficient evidence before him to support a finding that plaintiff's activities had affected public safety and welfare. Plaintiff offers no contrary evidence that would give rise to an inference that the decision was arbitrary or unreasonable. Plaintiff's substantive due process rights were not violated here.

As to plaintiff's procedural due process rights, plaintiff must first demonstrate that he has a protected life, liberty, or property interest that was violated. A constitutionally protected property interest in employment can arise where the employee has a "legitimate claim of entitlement to it,"

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14. Plaintiff provided the declaration of Terry Mace to show that his reputation in law enforcement had been damaged. However, the declarant offers only some inadmissible hearsay as to what he believed some other officers thought of plaintiff, and says that his own opinion of plaintiff had not changed.

rather than a mere "unilateral expectation." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Henderson*, 940 F.2d at 475. The general rule is that an employee terminable at will does not have a property interest in continued employment. Plaintiff admits that he was an at-will employee, and provides no evidence that he had an express or implied employment contract requiring termination only for good cause. Plaintiff therefore has no procedural due process rights that were violated in this since he has no recognized protected property interest in his job.

Nonetheless, plaintiff argues that he had a right to have an administrative hearing following the suspension of his card, and that the City's failure to provide such a hearing gives rise to a constitutional due process claim.[15] Plaintiff is incorrect. While it may be true that the Bell Gardens Municipal Code section providing for a hearing gave plaintiff

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15. The record is unclear as to the reason why plaintiff has not received a hearing. Defendants assert that plaintiff's counsel requested delays, and that counsel for both parties were unable to agree on who would conduct the hearing. Defendants also assert that the need for a hearing was rendered moot, either because plaintiff filed the instant lawsuit before the hearing could take place, or because the Club meanwhile had terminated plaintiff's employment for other reasons. Plaintiff denies that he ever refused to proceed or waived his codified right to the hearing. Plaintiff is suspicious of the City's motives in passing an emergency resolution to eliminate the code requirement that the hearing be given within seven days, since the resolution was adopted immediately after his card was suspended. Nonetheless, the City appears to have engaged in no apparent misconduct by delaying the hearing under these circumstances, and plaintiff offers no evidence that the City harbored an improper motive.

some degree of interest in having the City adhere to its procedures, it does not necessarily follow that that interest rises to a level entitled to constitutional protection. *Henderson*, 940 F.2d at 475. In other words, "a substantive property right cannot exist exclusively by virtue of a procedural right." *Id.*, quoting *Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir. 1986). Without an underlying "legitimate claim of entitlement" to his job at the Club, plaintiff has no protected constitutional interest in having the City follow its procedures for hearings.

Plaintiff also argues that he is entitled to have a hearing for "name clearing" purposes. However, to succeed with such an argument on constitutional grounds, plaintiff must show that his "good name, honor or integrity" are at stake because of the City's actions, and that he has been so stigmatized by publication of the charges against him that he has been precluded from employment in his chosen field. *Board of Regents*, 408 U.S. at 573-74. As explained above, plaintiff has brought forward no evidence that his good name has been tarnished in the community or that he has been unable to obtain other employment in his field as a result. To the contrary, several law enforcement officers have testified that plaintiff's reputation has remained intact despite the City's suspension of his card. Bishop Depo. at 416-17; Bender Depo. at 858-61. There is also no evidence offered that the allegations made against plaintiff were false.

Finally, the Club terminated plaintiff on August 2, 1996. After this point, it is clear that the need for a hearing to explore the possibility of restoring plaintiff's employment card was made moot by plaintiff's termination for other

causes. Whether the card had been returned or not, plaintiff still would not have been employed at the Club.

Defendants are therefore entitled to summary judgment on plaintiff's due process claims.

c. *Invasion of Privacy/Search of Office*

Plaintiff claims that the search of his office at the Bicycle Club, conducted first by Club employees at the direction of Club management, and later by BGPD officers shortly after his suspension, violated his privacy rights. This claim is brought against all defendants other than Hardie.[16]

The constitution provides protection against unreasonable searches and seizures. However, an employee has no legitimate expectation of privacy in the workplace (and a search is therefore "reasonable") where an established regulation permits the search. *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975). Here, Bell Gardens Municipal Code § 5.25.120 provides that the City (previously, through the City Manager, or presently through the Chief of Police) may inspect the Club at any time without a search warrant. Further, the Club itself had a policy that desks, lockers, and other such facilities were Club property and subject to search at any time. Plaintiff was aware of both the code and the Club's policy, and therefore could not have reasonably expected privacy as to items he kept in his office within the Club facility.

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16. Plaintiff has apparently dismissed this claim, along with his defamation claim, as against defendant Hardie.

In addition, the search by BGPD officers was done with the express consent of defendant Atherton, the Club's general manager. It is well established that a search based on the valid consent of a person having control of, or at least joint custody of, the premises does not violate the constitution, even in absence of a warrant. *United States v. Matlock*, 415 U.S. 164, 171 (1974). The Club itself was justified in searching the office, and in allowing the BGPD to do so, because the employer's interest in efficient and proper operation of the workplace has been held to substantially outweigh any privacy interest the employee may have there, particularly where employee malfeasance is suspected and the employer's search is reasonably designed to reach these legitimate goals. *O'Connor v. Ortega*, 480 U.S. 709, 721-23 (1987). As the Supreme Court explained, if plaintiff had desired to maintain privacy as to his personal belongings in this situation, he could have done so by leaving them at home. *Id.* at 725.

There are no material questions of fact as to the search of plaintiff's office raised on the record before the Court. The search did not violate plaintiff's right of privacy, and defendants are therefore entitled to summary judgment on this claim.

d. *Emotional Distress*

Plaintiff claims that defendant Hardie intentionally caused plaintiff to suffer emotional distress. To recover on this claim, plaintiff must show that he suffered severe or extreme emotional distress, and that Hardie's intentionally outrageous conduct was the actual and proximate cause of his distress. *Trerice v. Blue Cross of California*, 209

Cal.App.3d 878, 883 (1989). For conduct to be "outrageous" enough to permit recovery, plaintiff must show "extreme misconduct . . . exceeding all bounds usually tolerated by decent society." *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1129 (1989). Plaintiff has failed to demonstrate the existence of any outrageous conduct by Hardie.

First, much of the conduct complained of by plaintiff cannot be linked to Hardie. Although plaintiff offers evidence that he received photographs of Hardie on which notes were inscribed, he admitted in his deposition that he has no evidence Hardie sent these to him. To the contrary, defendant Wayne Martin admitted to sending the photographs to plaintiff, as a joke. Plaintiff also asserts that on July 23, 1995, two airplanes flew over the Club displaying banners, at least one of which contained negative statements about plaintiff. A police investigation resulted in a determination that the airplanes had been arranged for by one Kamran Mashayekhi, an individual who had been barred from the Club due to alleged criminal activity. Mashayekhi issued a press release announcing the fly-over, and the police uncovered evidence that someone named Kamran had contracted with a banner towing company at the Long Beach Airport for the fly-over. In support of his claim that Hardie was behind this activity, plaintiff offers, without supporting documentation, his belief that Hardie once used the same airplane company for Club business, and the fact that plaintiff once received a computer-generated drawing of an airplane with Hardie in the cockpit which said "Wings Over Bell Gardens."[17] These statements,

17. Defendant Atherton admits that he had the computer drawing made and presented to plaintiff as a joke, not as indication of involvement by Hardie in the fly-over incident.

without more, do not give rise to a reasonable inference that Hardie was involved in this conduct.

Finally, plaintiff bases his claims on alleged threats by Hardie to "get even" with plaintiff, some of which were delivered through other employees at the Club. Plaintiff testified in his deposition that during a conversation in his office in the latter part of 1994, Hardie told plaintiff "you ruined me and I'm going to get you." Assuming plaintiff's testimony to be true, this statement does not constitute the kind of outrageous conduct that gives rise to recovery under California law. *Holy Spirit Ass'n for Unification of World Christianity v. Molko*, 46 Cal.3d 1092, 1022 (1988); *Yurick*, 209 Cal.App.3d at 1128-29. Moreover, although plaintiff believes that certain individuals came to him as messengers, bearing further threats from Hardie, plaintiff admitted in his deposition that none of them ever told him Hardie had sent them. Since plaintiff has no evidence linking Hardie to any of the other statements, these too cannot be a basis for Hardie's liability. Nor can plaintiff's unsupported theory that Hardie was behind a conspiracy to cause plaintiff to lose his job as Director of Security at the Club. Plaintiff offers only his own speculation and belief, which are insufficient to defeat summary judgment. Hardie is thus entitled to summary judgment on plaintiff's claim for intentional infliction of emotional distress.

e. *Tortious Interference*

Plaintiff alleges that defendant Hardie tortiously interfered with his employment relationship with the Bicycle Club. Plaintiff was an at-will employee, and did not have an

employment contract. A claim for interference with economic relations is based on alleged wrongful interference with a person's right to establish lawful economic relationships. *Della Penna v. Toyota Motor Sales*, 11 Cal.4th 376, 381 n.2 (1995). As a matter of law, a party to a contract or economic relationship cannot be liable for "interfering" with that relationship. *Kasparian v. County of Los Angeles*, 38 Cal.App.4th 242, 265 (1995).

Hardie was and is a party to plaintiff's economic relationship with the Bicycle Club, since he is a part-owner (holding approximately 45%) of Park Place Associates, which owns a 35% interest in the Club. During much of the relevant time, Hardie was General Partner of Park Place Associates, either individually or through his wholly owned corporation, Kard King, Inc. Since Hardie is a party to the relationship, he could not have interfered with it as a matter of law, and no evidence plaintiff has provided of his activities supports such a claim. *Kasparian*, 38 Cal.App.4th at 265-66.

f. *Civil Rights*

Finally, plaintiff claims that all the named defendants in this case conspired to deprive plaintiff of his civil rights. This claim is based on plaintiff's termination, which plaintiff alleges was accomplished in retaliation for his "whistleblowing" activities.[18] Plaintiff brings this claim under 42 U.S.C. § 1983.

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18. To the extent plaintiff's claim also arises from the alleged improper search of plaintiff's office, defendants are not liable for that activity as explained above.

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As explained above, Frederick Wyle made the decision to terminate plaintiff. Plaintiff offers no evidence that the defendants in this case had any involvement in that decision or had influence over Wyle. Wyle first became involved with the Club after plaintiff had already been suspended. Moreover, there were ample legitimate reasons for terminating plaintiff. As described above, plaintiff concedes he engaged in several actions that violated Club policy and the instructions given to him by Club managers. The Club asserts that these legitimate reasons were the cause of his termination, and has provided sufficient evidence to support such a finding even under a heightened "good cause" standard. *Cotran*, 17 Cal.4th at 107-09. With this assertion (assuming *arguendo* that plaintiff could prove a prima facie case), the burden shifts to plaintiff to come forward come forward with evidence that the Club's reasons are mere pretext. *Flait*, 3 Cal.App.4th at 476. Plaintiff offers no such evidence, nor does he contradict the Club's assertions that he engaged in the behavior the Club complains of here. Plaintiff therefore cannot recover on his § 1983 claim under this theory.

Moreover, plaintiff's arguments that the defendants wrongfully conspired to terminate him also fail. To make out a case for conspiracy liability, plaintiff must show both an express or implied agreement between the defendants to deprive him of his rights, and that he actually was deprived of a federally protected right as a result of the agreement. *Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989).

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Plaintiff has not demonstrated the existence of a conspiracy between the defendants, or that that conspiracy caused him to be terminated for an improper reason. Plaintiff must bring forward more than conclusory statements and allegations of conspiracy; he must offer the Court material facts from which a reasonable jury could conclude a conspiracy existed. *Woodrum*, 866 F.2d at 1126; *Anderson*, 477 U.S. at 252. Facts demonstrating that the Club produces revenue for the City and that the City regulates or expresses interest in activity that goes on at the Club are not indicative of any wrongdoing with regard to plaintiff, and do not give rise to any inference of improper activity between the defendants.[19] Plaintiff offers no evidence that Chief

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19. The record reveals: (1) the transcript of an interview of defendant Richard by BGPD detectives, conducted on April 10, 1996, where Richard stated "I just think he's [plaintiff's] got a real problem. I know you guys will take care of it," (Wise Master Decl. Ex. XX) (2) a document purporting to be a preliminary draft of defendant Atherton's testimony before the United States Senate, in which Atherton wrote that plaintiff was "the government's next target," that the Trustee had a "plan to eliminate him," that plaintiff's career was used "as a bargaining chip to appease Mr. Hardie" and that the "pretext" for plaintiff's termination "was to be that he [was] performing outside consulting work for other card clubs," (Wise Master Decl. Ex. FF), and (3) a letter between counsel in the case *United States v. Kramer* that appears to propose the terms of a settlement agreement, stating "[w]e understood that Messrs. Richard and Hardie agreed that Doug Sparkes, who has engaged in a number of activities which have not been in the best interests of the Club, including a clear conflict of interest, would be let go" (Complaint Ex. A). Assuming, for purposes of argument, that this evidence is admissible, the Court finds that no rational inferences can be drawn from this evidence to support plaintiff's theories. First, there is no

(Cont'd)

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Freeman's decision to suspend his employment card was made at the direction of or pursuant to an agreement with any of the other defendants. Likewise, plaintiff offers no evidence that the City or Chief Freeman were in any way involved in the Club's decision to terminate plaintiff. Even if plaintiff could show that some of the individuals associated with the Club had agreed to bring about plaintiff's termination, or that they were upset by plaintiff's testimony before the United States Senate and by his investigations at the Club, such a conspiracy would not involve any persons acting under color of state law, as required under § 1983. *United Steelworkers of America v. Phelps Dodge Corp.*, 833 F.2d 804, 805 (9th Cir. 1987). Plaintiff's conspiracy theory is unsupported by facts that evidence an agreement between the defendants to violate his civil rights and is therefore untenable.

(Cont'd)
evidence that the City or the BGPD were in any way under the control of the Club management, and all persons involved have testified that, to the contrary, there was no such relationship. Even if Richard's statement to the BGPD is taken to mean that Richard expected the BGPD to resolve his difficulties with plaintiff in some way, there is no evidence that Chief Freeman acted under anything other than his own initiative when he decided to suspend plaintiff's card. The other two items of evidence do not implicate Chief Freeman or the City at all; at best, they both describe a plan between Richard and Hardie to terminate plaintiff for legitimate reasons. Plaintiff's eventual termination was not even based on the reasons they proposed, but was instead based on other misconduct by plaintiff. Even if the Court were to believe Hardie and Richard agreed to terminate plaintiff, this "conspiracy" did not cause the harm plaintiff complains of here, since the uncontroverted facts show plaintiff was terminated based on his own improper conduct and without the involvement of either Richard or Hardie.

Finally, plaintiff also argues that statements given to the police by defendants Richard, Atherton, and Martin give rise to a cause of action against them under § 1983. Plaintiff alleges that their statements were the basis for a police report about him, in which the BGPD apparently concluded that plaintiff obstructed justice. Plaintiff cannot recover on this theory because he offers no evidence that these defendants had any control over the police investigation, or that they conspired with others to do so. It is undisputed on this record that the defendants' statements were offered to law enforcement as part of a legitimate investigation, that this was their only role in the process, and that they were not directly involved in production of the police report at issue here. This type of participation in a legitimate police investigation cannot give rise to § 1983 liability as a matter of law. *Rivera v. Green*, 775 F.2d 1381, 1384 (9th Cir. 1985); *Goehring v. Wright*, 858 F. Supp. 989, 998 (N.D. Cal. 1994).

Defendants are therefore entitled to summary judgment on plaintiff's § 1983 claims.[20]

III. *Conclusion*

Since no genuine questions of material fact exist on this record, summary judgment for the defendants on all of plaintiff's claims is appropriate. The Court therefore grants defendants' motions.

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20. The Court declines to rule on the issue of whether Chief Freeman is immune from suit on any of the claims brought against him, as the Court concludes it has sufficient alternative grounds for its decision.

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SO ORDERED.

Date: August 11, 1998

s/ Christina A. Snyder
CHRISTINA A. SNYDER
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION ON MOTION OF BELL GARDENS BICYCLE CLUB, THOMAS ATHERTON AND WAYNE MARTIN FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS DATED AND FILED AUGUST 11, 1998 AND ENTERED AUGUST 14, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-96-7343-CAS (MCx)

DOUGLAS SPARKES,

Plaintiff,

vs.

BICYCLE CLUB CASINO, a gambling establishment; LCP and PARK PLACE ASSOCIATES, partnerships which operate and participate in the decision making operations of the BICYCLE CLUB; GEORGE HARDIE, as an individual; HARRY RICHARD, as an individual; THOMAS ATHERTON, as an individual; WAYNE MARTIN, as an individual; CHIEF FRED FREEMAN, as the Chief of Police for the City of Bell Gardens and as an individual; THE CITY OF BELL GARDENS, a municipal corporation; DOE CORPORATIONS 1-19 and DOE DEFENDANTS 20-30,

Defendants.

Appendix C

ORDER ON MOTION OF COUNTERCLAIMANTS BELL GARDENS BICYCLE CLUB, THOMAS ATHERTON AND WAYNE MARTIN FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS

Counterclaimants Thomas Atherton ("Atherton"), Wayne Martin ("Martin"), and the Bell Gardens Bicycle Club ("Bicycle Club" or "the Club") brought the instant motion for summary judgment on their counterclaims for (1) claim and delivery, (2) conversion, (3) violation of Penal Code § 632(a), (4) invasion of privacy, and (5) injunction. After reviewing the materials submitted by the parties, argument of counsel, and the case file, the Court grants counterclaimants' motion.

I. *Factual Background*

Counterdefendant Douglas Sparkes ("Sparkes") worked at the Bicycle Club as Director of Security from June 1992 through April of 1996, when he was suspended from employment.

The Club maintained a policy that all work produced on company time, or using company equipment or property, was the exclusive property of the Club. Further, no company manuals were to be taken off the Club property, and no work materials were to be copied or given to others outside the Club. Sparkes was aware of these policies during his employment. Nonetheless, Sparkes removed several documents and tapes from Club property and has kept them at his home and at his attorneys' offices. Many of these documents have been produced to counsel for the

counterclaimants in the course of discovery in this litigation, without a protective order. The Club has demanded that Sparkes return all Club-owned materials, but Sparkes has thus far refused.

In addition, on several occasions during his employment at the Club, Sparkes surreptitiously audiotaped conversations between himself and certain other officers or employees of the Club. In July of 1994, Sparkes taped a conversation he had with Stephen Kuypers in the men's restroom at the Club. On November 4, 1994, Sparkes taped a second conversation with Kuypers which took place in a private office with no other persons present. On November 8, 1994, Sparkes taped a conversation between himself, Thomas Atherton, and Wayne Martin. This conversation took place in Atherton's office, with no one else present. On December 30, 1994, Sparkes taped a second conversation with Atherton in Atherton's office. On December 15, 1994, Sparkes taped a conversation between himself and Harry Richard, which is the subject of a separate counterclaim (and summary judgment motion) by Richard.[1]

It is undisputed that the individuals involved in these conversations were unaware that Sparkes was recording them, did not consent to the recordings, and believed the content of the conversations was private and would not be divulged to others. They and the Club first learned of the

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1. Counterclaimants also claim that Sparkes secretly recorded a private management meeting on March 26, 1996. However, the record fails to establish that Sparkes was the one who recorded this meeting. Consequently, the Court finds that counterclaimants are not entitled to recovery based on that alleged event.

recordings in this litigation. The Club has requested that the tapes be returned, but Sparkes has refused to do so.

II. *Analysis*

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The standard set forth in Rule 56(c) is met when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Abromson v. American Pacific Corp.*, 114 F.3d 898, 902 (9th Cir. 1997). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could affect the outcome of the suit under governing law. *Id.*

When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A. E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997).

Although not required to "scour the record" on its own to determine whether any questions of material fact are present, *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7th Cir. 1994), this Court engaged in extensive and

thorough review of all of the materials submitted by the parties, and gave careful attention to each item of evidence provided. Certain facts the Court found most salient to its analysis are discussed below.

a. *Claim and Delivery/Conversion*

It is undisputed that Sparkes removed from the Club documents and tapes belonging to it. Many of these items contain confidential and privileged information. Club policy establishes that items created on Club time and using Club property or equipment are the property of the Club, and that they are not to be shown to persons outside the Club. Sparkes admits he was aware of these policies.

When an employee takes documents from the employer without its permission, the employer is entitled to the return of those documents. Even employees who expect to be (or are) parties to litigation are not privileged to engage in "self-help" discovery by removing documents that belong to the employer.[2]

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2. *Church of Scientology v. Armstrong*, 232 Cal.App.3d 1060 (1991), is not to the contrary. That case, applying the Restatement Second of Torts, establishes that interference with the chattels of another (i.e., taking property belonging to the employer) may be justified where the taker reasonably believes he is in danger of bodily harm. In that case, specific threats were made against the employee and his wife, and the employer's investigators shoved him, struck his elbow with a car, and attempted to run him off the road. As explained in *Pillsbury*, 55 Cal.App.4th at 1288, "[j]ustification is an exception rarely employed and designed to preserve life and limb." Although Sparkes here claims that he feared George Hardie was "out to get him," no facts on the record indicate that his fear was reasonable, and he points to no threats of bodily harm or attempts to actually cause harm by Hardie or anyone else.

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Pillsbury, Madison & Sutro v. Schectman, 55 Cal.App.4th 1279, 1288 (1997); *Furnish v. Merlo*, 1994 WL 574137 (D. Or. Aug. 29, 1994). Although Sparkes argues that he was entitled to take and keep the documents because he is involved in several lawsuits with the Club, this argument fails under California law. Such documents are to be obtained through proper use of the discovery process.

Sparkes also argues that he took some of the documents with authorization, because he needed them to prepare for his testimony before the United States Senate and/or for use in other cases that had been brought against the Club. However, assuming Sparkes did at some point get approval to take the documents, it is undisputed that the Club has since asked for the documents back. Any authorization at best applied to only a portion of the documents at issue, and has been revoked. Sparkes further argues that he was entitled to take documents for law enforcement purposes. However, Sparkes does not show that the particular documents now in his possession were taken off the Club premises at the valid request of law enforcement officers.

Further, the Club has repeatedly demanded return of the materials, but Sparkes has refused to do so. Sparkes lacks privilege or justification for keeping these materials. His continued possession of them is wrongful, and the Club is entitled to summary judgment on these claims.[3]

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3. Since Sparkes is entitled to proper discovery in the course of litigation, to the extent any of the materials identified on the list attached to counterclaimants' brief have already been produced to Sparkes in discovery (by the Club or by others), he may of course retain those materials.

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b. *California Penal Code § 632*

It is a violation of California Penal Code § 632 for a person to "intentionally and without the consent of all parties to a confidential communication, by means of any . . . recording device, [to] . . . record[ ] the confidential communication." Cal. Penal Code § 632(a). For a communication to be protected as confidential, the party secretly recorded must have had a reasonable expectation that it was private and that no one was overhearing it. *Coulter v. Bank of America, NT&SA*, 28 Cal.App.4th 923, 929 (1994). Whether the party was creating the recording intended the conversation to remain private is not determinative of its character as private. *Id.*

In *Coulter*, the parties' expectations of privacy were held reasonable when the conversations occurred in private locations, with no other persons present or believed to be listening in, and where the parties had no knowledge of and gave no consent to the conversation being recorded. *Id.* at 929-30. As in *Coulter*, the participants in the conversations at issue here have submitted declarations that they intended and expected their conversations with Sparkes to be private and confidential. The participants both did not know about the recording did not consent to the recording. The conversation with Atherton, and the conversation with Atherton and Martin, both took place in Atherton's private office, with no other persons present. The conversation with Richard, as explained in the motion brought by Richard, was likewise conducted in a private area with no one else present.

The second conversation with Kuypers likewise took place in a private office with no one else present.[4]

Moreover, the content of these conversations involved confidential business matters and sensitive issues related to the Club, matters of the sort persons are often reasonably interested in keeping private, and matters which the participants here declare they intended be kept confidential. These conversations were therefore confidential for purposes of § 632.[5]

In opposition, Sparkes argues that the participants should not have expected privacy because video and audio

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4. The first conversation with Kuypers, however, took place in the men's restroom at the Club. Neither Kuypers nor Sparkes apparently checked to see if anyone else was in the restroom when they spoke, nor was the room closed to entry by others. Kuypers therefore did not have a reasonable expectation of privacy as to this conversation held at this location, and Sparkes' tape recording of it does not violate § 632 or Kuypers' right to privacy.

5. This is true even under the standard enunciated in *O'Laskey v. Sortino*, 224 Cal.App.3d 241 (1990). In that case, although a telephone conversation was recorded without the knowledge of one party, the circumstances of the conversation indicate that the party clearly intended the conversation to be made public (he believed he would win a prize and that his answers to some questions posed by the stranger on the line could be broadcast on television). Even in that case, the court recognized that "an expectation of privacy is objectively reasonable in telephone conversations between business associates relating to ongoing ventures" and in similar situations. *Id.* at 248. Thus, even under *O'Laskey*, the conversations are protected.

surveillance was routinely conducted at the Bicycle Club, and several signs warned patrons and employees alike upon entering the Club that they could be subject to surveillance. However, although the casino floor was routinely monitored by extensive electronic surveillance equipment, nothing in the record indicates that the executive offices were similarly surveyed, or that any of the warnings applied to the private executive offices. The facts indicate that the executive suite is a private, secluded area, separate from the casino floor, and that the area where the conversations took place was not subject to surveillance, nor was surveillance expected in that area.[6]

Sparkes also argues that he recorded the conversations for the purpose of uncovering criminal activity, and/or at

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6. There is some dispute in the record as to whether at one time some of the executive offices had been surreptitiously "bugged", whether a pinhole camera had once been utilized for some purpose within the executive suite, and whether the Human Resources department on certain occasions videotaped employees that were being questioned about possible wrongdoing in a room they had specifically set up for that purpose. Even if proven, none of these facts would defeat the participants' reasonable expectation that no surveillance would be conducted within the executive offices. For one thing, when the "bugging" was suspected, Club management had immediately brought in a specialist to find and eliminate any of the devices. None of the conversations took place near the Human Resources "interrogation room" where the camera may have been. Further, it is undisputed that there actually was no surveillance equipment set up in the relevant areas at the time the conversations took place. The participants, all members of the Club's management, were in a position to know whether surveillance had been authorized or was being conducted in these areas, and all at the relevant times reasonably expected that it was not.

the direction of law enforcement officers, which is allowable under Penal Code § 633. However, statements in his own deposition testimony belie these arguments. Although Sparkes had received specific aunhorization from law enforcement officers to surreptitiously record certain other individuals on previous occasions, he could not say that he was authorized by officers to tape any of these conversations. The most evidence Sparkes has offered in support of this argument is his statement that he was "generally directed to procure and provide to [the officers] the information which is discussed on these tapes" (specifically, the Richard tape) and that he had been generally instructed by Marshal Meachum to act as his "eyes and ears" at the Club. Sparkes Decl. (Pl.'s Confid. Ex. MM) at 2. None of this very general instruction from law enforcement officers indicates at all that Sparkes recorded the conversations at the "direction" from law enforcement officers. To the contrary, the law enforcement officers allegedly involved did not even know of the recordings, and all testify that they did not authorize them. Marshal Meachum, now deceased, had ended his involvement with the Bicycle Club in 1994, long before the conversation with Richard occurred. Wise Master Decl. Ex. HHHH at 83 (Sparkes Depo. p. 407) Sparkes' general role as an "informant" for the police is insufficient to place his activities under the protections of § 633.

Nor is Sparkes' argument that the Omnibus Crime Control and Safe Streets Act applies here persuasive to the Court. Sparkes fails to put forth any legitimate reason why, under *Roberts v. Americable Int'l, Inc.*, 883 F. Supp. 499 (E.D. Cal. 1995) or any other authority, that Act should be applied to this case rather than the California Penal Code.

Appendix C

c. *California Constitution, Article 1*

Article 1, section 1 of the California Constitution provides for a right of privacy for each individual. One of the purposes of this section is to protect persons from "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White v. Davis*, 13 Cal.3d 757, 773 (1975). To recover for invasion of this right to privacy, the claimant must show that he has a legally protected privacy interest and a reasonable expectation of privacy, and that the defendant's conduct seriously invaded the claimant's privacy. *Baughman v. State*, 38 Cal.App.4th 182, 189 (1995).

Here, individual claimants Atherton and Martin have shown that they had a legally protected right to privacy in the conversations they had with Sparkes, as explained above.[7] Cal. Penal Code § 632. As explained above, their expectations of privacy in those conversations were plainly reasonable, and Sparkes' taping therefore constituted a serious invasion of their protected privacy rights.

III. *Conclusion*

The Court therefore finds that there is no genuine question of material fact on this record as to the

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7. As explained above, the first conversation with Kuypers, which took place in the men's restroom, is not protected under § 632 and therefore is not protected under a constitutional right to privacy theory either. Kuypers is not a party to this suit and does not join in this claim. Counterclaimant Richard's rights under the constitution are addressed in his separate motion.

counterclaims, and hereby grants summary judgment for counterclaimants Bell Gardens Bicycle Club, Thomas Atherton, and Wayne Martin.

Sparkes' conduct constituted both a violation of Penal Code § 632, and a violation of Article 1, § 1 of the California Constitution as to individual claimants Atherton and Martin. Penal Code § 637.2(a) provides that persons[8] injured by violations of § 632 may recover statutory damages of $5,000 for each violation from the person who committed the violation. Judgment shall therefore be entered for $5,000 for each instance of § 632 violation affecting the Club, Atherton, and Martin.[9]

Further, § 637.2(b) provides for the injured party to seek to have the Court enjoin and restrain violations of § 632, in addition to awarding damages. To avoid further harm to the counterclaimants, the Court hereby directs Sparkes to return custody and control of the original and all copies of the unlawful recordings to the Club (or, as to recordings involving them, to Atherton and Martin) forthwith.

Finally, counterclaimants have requested an injunction ordering Sparkes to return the materials he has wrongfully taken from the Club. Such an injunction is proper under Cal. Civil Code § 3380, which provides that "[a]ny person having

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8. The term "person" in the statute includes not only natural persons, but also corporations that are harmed by violations of § 632. *Coulter*, 28 Cal.App.4th 923, 930 (1994).

9. Plaintiff may bring on a motion for stay of this portion of the judgment pending an appeal herein.

the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession." Moreover, this remedy is appropriate because it will, to the extent possible, restore the parties to the positions they would have been in had the documents not been taken, without placing additional penalties on counterdefendant. *Pillsbury*, 55 Cal.App.4th at 1288-89; *Conn v. Superior Court*, 196 Cal.App.3d 774, 785 (1987). The Court therefore directs Sparkes to return the materials he took from the Club immediately.

Counterclaimants shall submit a proposed judgment and form of injunction.

SO ORDERED.

Date: August 11, 1998

s/ Christina A. Snyder
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION ON MOTION OF HARRY RICHARD FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS DATED AND FILED AUGUST 11, 1998 AND ENTERED AUGUST 14, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-96-7343-CAS (MCx)

DOUGLAS SPARKES,

Plaintiff,

vs.

BICYCLE CLUB CASINO, a gambling establishment; LCP and PARK PLACE ASSOCIATES, partnerships which operate and participate in the decision making operations of the BICYCLE CLUB; GEORGE HARDIE, as an individual; HARRY RICHARD, as an individual; THOMAS ATHERTON, as an individual; WAYNE MARTIN, as an individual; CHIEF FRED FREEMAN, as the Chief of Police for the City of Bell Gardens and as an individual; THE CITY OF BELL GARDENS, a municipal corporation; DOE CORPORATIONS 1-19 and DOE DEFENDANTS 20-30,

Defendants.

Appendix D

ORDER ON COUNTERCLAIMANT HARRY RICHARD'S MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS

Counterclaimant Harry Richard ("Richard") has brought the instant motion for summary judgment on his counterclaims for (1) violation of Penal Code § 632(a), (2) violation of his right of privacy under the California Constitution, and (3) injunction. After reviewing the materials submitted by the parties, argument of counsel, and the case file, the Court grants counterclaimant's motion.

I. *Factual Background*

Richard and counterdefendant Douglas Sparkes ("Sparkes") both worked in the executive offices of the Bell Gardens Bicycle Club ("Bicycle Club" or "Club"). Richard was the appointed Successor Trustee for the United States and served as interim General Manager of the Bicycle Club at the time in question here. Sparkes served as Director of Security.

On December 15, 1994, a conversation took place between Richard and Sparkes. The conversation began in Richard's private office, located within the private executive suite at the Bicycle Club. As the conversation progressed, Sparkes and Richard walked out of the office, through the executive suite hallway, and down a staircase. No other person was present in Richard's office, in the hallway, or in

the stairway at that time. At the bottom of the stairs, they walked through a secured door and out onto the casino floor.[1]

Richard states that he intended and expected this conversation to be confidential. He did not believe or expect anyone else to listen in, overhear, or record the conversation, because he and Sparkes were alone when they spoke, in a private area of the Bicycle Club. Richard did not expect Sparkes to divulge the content of the conversation to anyone else and he did not authorize Sparkes to do so. Richard. Decl. at 23-24.

Contrary to Richard's expectations and knowledge, Sparkes had activated a tape recorder attached to his belt before the start of the conversation, and had secretly recorded the entire discussion. Richard did not learn of the existence of the recording until February of 1997, in the context of this litigation. When Richard learned of the tape, he requested that it, and any purported transcripts of its contents, be returned to him. Sparkes has thus far refused his request.

II. *Analysis*

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The standard set forth in Rule 56(c) is met when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's

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1. Although the conversation continued after they walked out the door, Richard does not claim any privacy interest in that portion of the conversation.

case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Abromson v. American Pacific Corp.*, 114 F.3d 898, 902 (9th Cir. 1997). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could affect the outcome of the suit under the governing law. *Id.*

When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A. E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997).

Although it is not required to "scour the record" on its own to determine whether any questions of material fact are present, *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7th Cir. 1994), the Court has engaged in a thorough review of all of the materials submitted by the parties, and has given careful attention to each item of evidence provided. Certain facts the Court found most salient to its analysis are discussed below.

a. *California Penal Code § 632*

It is a violation of California Penal Code § 632 for a person to "intentionally and without the consent of all parties to a confidential communication, by means of any . . . recording device, [to] . . . record[ ] the confidential communication." Cal. Penal Code § 632(a). For a

communication to be protected as confidential, the party secretly recorded must have had a reasonable expectation that it was private and that no one was overhearing it. *Coulter v. Bank of America, NT&SA*, 28 Cal.App.4th 923, 929 (1994). Whether the party creating the recording intended the conversation to remain private is not determinative of its character as private. *Id.*

In *Coulter*, the parties' expectations of privacy were held reasonable when the conversations occurred in private locations, with no other persons present or believed to be listening in, and where the parties had no knowledge of and gave no consent to the conversation being recorded. *Id.* at 929-30. As in *Coulter*, Richard has submitted a declaration that he intended and expected his conversation with Sparkes to be private and confidential. The parties agree that as the conversation took place in Richard's private office and in the executive hallway/staircase area, no one else was present. Further, Sparkes admits that Richard both did not know about the recording and did not consent to the recording. Smith Decl. Ex. A at 33, 40. The conversation was therefore confidential for purposes of § 632.[2]

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2. This is true even under the standard enunciated in *O'Laskey v. Sortino*, 224 Cal.App.3d 241 (1990). In that case, although a telephone conversation was recorded without the knowledge of one party, the circumstances of the conversation indicate that the party clearly intended the conversation to be made public (he believed he would win a prize and that his answers to some questions posed by the stranger on the line could be broadcast on television). Even in that case, the court recognized that "an expectation of privacy is objectively reasonable in telephone conversations between business associates relating to ongoing ventures" and in similar situations. *Id.* at 248. Thus, even under *O'Laskey*, this conversation is protected.

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In opposition, Sparkes argues that Richard should not have expected privacy because video and audio surveillance was routinely conducted at the Bicycle Club, and several signs warned patrons and employees alike upon entering the Club that they could be subject to surveillance. However, although the casino floor was routinely monitored by extensive electronic surveillance equipment, nothing in the record indicates that the executive offices were similarly surveyed, or that any of the warnings applied to the private executive offices. The facts indicate that the executive suite is a private, secluded area, separate from the casino floor, and that the area where the conversation took place was not subject to surveillance, nor was surveillance expected in that area.[3]

Sparkes also argues that he recorded the conversation for the purpose of uncovering criminal activity, and/or at the direction of law enforcement officers, which is allowable under Penal Code § 633. However, Sparkes' deposition

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3. There is some dispute in the record as to whether at one time some of the executive offices had been surreptitiously "bugged" or whether a pinhole camera had been utilized for some purpose within the executive suite. Even if proven, none of these facts would defeat Richard's reasonable expectation that no surveillance would be conducted in this part of the executive suite. For one thing, when the "bugging" was suspected, Club management had immediately brought in a specialist to find and eliminate any of the devices. Further, it is undisputed that there actually was no surveillance equipment set up in the relevant area at the time the conversation took place. Finally, Richard, as general manager of the Club, was in a position to know where the Club was conducting surveillance, and to authorize locations for surveillance. He reasonably believed that none was in place in that area.

testimony is inconsistent with these arguments. Sparkes testified that he recorded the conversation because he believed Richard and others were trying to oust him from the Club. Smith Decl. Ex. A at 39. Sparkes admitted that he did not have reason to believe that Richard had committed a crime. Smith Decl. Ex. A at 35-37. Although Sparkes had received specific authorization from law enforcement officers to surreptitiously record certain other individuals on previous occasions, he could not say that he was authorized by officers to tape this conversation (or any other conversations involving Richard). Smith Decl. Ex. A at 29-30. The most evidence Sparkes has offered in support of this argument is his statement that he was "generally directed to procure and provide to [the officers] the information which is discussed on these tapes" and that he had been generally instructed by Marshal Meachum to act as his "eyes and ears" at the Club. Sparkes Decl. (Pl.'s Confid. Ex. MM) at 2. None of this very general instruction from law enforcement officers indicates that Sparkes recorded the conversation at the "direction" of law enforcement officers. To the contrary, the law enforcement officers allegedly involved did not even know of the recording, and all testify that they did not authorize it. Smith Decl. Ex. C, D, E. Marshal Meachum, now deceased, had ended his involvement with the Bicycle Club in 1994, long before the conversation with Richard occurred. Wise Master Decl. Ex. HHHH at 83 (Sparkes Depo. p. 407).

b. *California Constitution, Article 1*

Article 1, section 1 of the California Constitution provides for a right of privacy for each individual. One of the purposes of this section is to protect persons from "the

accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White v. Davis*, 13 Cal.3d 757, 773 (1975) To recover for invasion of this right to privacy, the claimant must show that he has a legally protected privacy interest and a reasonable expectation of privacy, and that the defendant's conduct seriously invaded the claimant's privacy. *Baughman v. State*, 38 Cal.App.4th 182, 189 (1995).

Here, Richard has shown that he had a legally protected right to privacy in the conversation he had with Sparkes, as explained above. Cal. Penal Code § 632. As explained above, Richard's expectation of privacy in that conversation was plainly reasonable, and Sparkes' taping thereof constituted a serious invasion of Richard's privacy rights.

III. *Conclusion*

The Court therefore finds that there is no genuine question of material fact on this record as to Richard's counterclaims, and hereby grants summary judgment for counterclaimant Richard. Sparkes' conduct constituted both a violation of Penal Code § 632 and a violation of Article 1, § 1 of the California Constitution.

Penal Code § 637.2(a) provides that persons injured by violations of § 632 may recover statutory damages of $5,000 for each violation from the person who committed the violation. Judgment shall therefore be entered for Richards in the amount of $5,000.[4]

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4. Plaintiff may bring on a motion for stay of this portion of the judgment pending an appeal herein.

Further, § 637.2(b) provides for the injured party to seek to have the Court enjoin and restrain violations of § 632, in addition to awarding damages. To avoid further harm to Richards, the Court hereby directs Sparkes to return custody and control of the original and all copies of the unlawful recording to Richards forthwith.

Counterclaimant shall submit a proposed judgment and form of injunction.

SO ORDERED.

Date: August 11, 1998

s/ Christina A. Snyder
CHRISTINA A. SNYDER
UNITED STATES DISTRICT
JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-56617
D.C. No. CV-96-07343-CAS

DOUGLAS SPARKES,

Plaintiff-counter-defendant –
Appellant,

v.

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Defendants-counter-claimants –
Appellees,

LCP & PARK PLACE ASSOCIATES, partnerships which operates & participate in the decisionmaking operations of the BICYCLE CLUB; LADBROK, a foreign corporation; FRED FREEMAN, Chief, as the Chief of Police for the City of Bell Gardens & as an individual; CITY OF BELL GARDENS, a municipal corporation; GEORGE HARDIE,

Defendants-Appellees.

Appendix E

No. 98-56785
D.C. No. CV-96-07343-CAS

DOUGLAS SPARKES,

Plaintiff-counter-defendant –
Appellant,

v.

LCP & PARK PLACE ASSOCIATES, partnerships which operates & participate in the decisionmaking operations of the BICYCLE CLUB; LADBROK, a foreign corporation; FRED FREEMAN, Chief, as the Chief of Police for the City of Bell Gardens & as an individual; CITY OF BELL GARDENS, a municipal corporation; GEORGE HARDIE;

Defendants – Appellees,

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Defendants-counter-claimants –
Appellees.

Appendix E

No. 98-56788
D.C. No. CV-96-07343-CAS

DOUGLAS SPARKES,

Plaintiff-counter-defendant – Appellant,

v.

LCP & PARK PLACE ASSOCIATES, partnerships which operates & participate in the decisionmaking operations of the BICYCLE CLUB; LADBROK, a foreign corporation; FRED FREEMAN, Chief, as the Chief of Police for the City of Bell Gardens & as an individual; CITY OF BELL GARDENS, a municipal corporation; GEORGE HARDIE,

Defendants – Appellees,

BICYCLE CLUB CASINO, a gambling establishment; HARRY RICHARD; THOMAS ATHERTON; WAYNE MARTIN,

Defendants-counter-claimants – Appellees.

ORDER DENYING PETITION FOR REHEARING - AND REHEARING EN BANC

Before: FERNANDEZ, TASHIMA and SILVERMAN, Circuit Judges.

Appendix E

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F — APPLICABLE FEDERAL AND STATE LAWS

FEDERAL LAWS

United States Constitution, First Amendment:

> Congress shall make no law . . . abridging the freedom of speech. . . .

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fifth Amendment:

> No person shall be held to answer . . . nor be deprived of life, liberty or property, without due process of law.

United States Constitution, Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Appendix F

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Federal Omnibus Crime Act, 18 Section 2511, in pertinent part:

* * *

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

* * *

Appendix F

Federal Rules of Evidence, Rule 408:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

STATE LAWS

California Labor Code Section 1102.5, in pertinent part:

* * *

> (a) No employer shall make, adopt or enforce any rule, regulation or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information

discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

* * *

California Penal Code Section 632, in pertinent part:

* * *

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

* * *

(c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or . . . in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

* * *

California Penal Code Section 633, in pertinent part:

Nothing in Section 631, 632, 632.5, 632.6 or 632.7 prohibits the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, any officer of the California Highway Patrol, any chief of police, assistant chief of police, or police officer of a city or city and county, any sheriff, undersheriff, or deputy sheriff regularly employed and paid in that capacity by a county, or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority, from overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

Nothing in Section 631, 632, 632.5, 632.6 or 632.7 renders inadmissible any evidence obtained by the

above-named persons by means of overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

* * *

City of Bell Gardens Municipal Code, Section 5.25, in pertinent parts, provide as follows:

* * *

1. Card Clubs were to be open for inspection at all times, while City representatives could inspect such clubs at any time without a search warrant. Prior to February 1996, only the "City Manager" or his authorized representative was entitled to conduct such inspections. In February 1996, the City's Code was amended to provide that the Chief of Police, or his representative, was authorized to conduct these warrantless inspections.

A. Card Clubs were prohibited from employing anyone who does not possess a valid employment identification card issued by the City.

* * *

E. An employment identification card may be suspended or revoked under the following circumstances . . . The identification card may be

Appendix F

immediately suspended by the chief of police if the offense is such to cause an immediate threat to the public welfare. Such immediate suspension shall re in effect for seven days or until a final decision is rendered by a hearing officer appointed by the city manager, whichever occurs

Note: The seven-day hearing provision was eliminated shortly after Douglas Sparkes' was suspended.

* * * *